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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956.

No. 984

ASPEN PICTURES, INC.,
Petitioner,

vs.

THE OCEANIC STEAMSHIP COMPANY and
MATSON NAVIGATION COMPANY,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEALS OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT.

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ASPEN PICTURES, INC.,
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THE OCEANIC STEAMSHIP COMPANY and
MATSON NAVIGATION COMPANY,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEALS OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT.

Petitioner, Aspen Pictures, Inc., prays that a Writ of Certiorari issue to review the judgment of the Superior Court of Los Angeles County (Appendix B, *infra*, pp. A9 to A10), as affirmed by the District Court of Appeals of the State of California, Second Appellate District, which said decision affirming the trial court's judgment was entered in the above entitled case in February, 1957.

CITATIONS TO OPINIONS BELOW.

The memorandum opinion of the trial court (The Superior Court of the State of California, in and for the County of Los Angeles, the Honorable Roy L. Herndon, Judge presiding, hereinafter referred to as "the trial court") in denying petitioner's motion for a new trial is unreported and is printed in Appendix B hereto, *infra*, pp. A10 to A16. The opinion of the District Court of Appeals, Second Appellate District, State of California, printed in Appendix B hereto, *infra*, pp. A16 to A36, is reported in 148 A. C. A. 237, 306 P. 2d 933 (1957).

JURISDICTION.

The judgment of the District Court of Appeal, Second Appellate District, State of California, was entered on February 4, 1957, and is dated February 4, 1957. The California Supreme Court requires that a petition for hearing in said court after decision of the District Court of Appeal must be filed within 40 days after filing of the decision of the District Court of Appeal and the Supreme Court may order the cause transferred to itself for hearing and decision not more than 60 days after the filing of the decision of the District Court of Appeal (California, Rules on Appeal, Rule 28). Within said 40 days Petitioner filed its Petition for Hearing in the Supreme Court of the State of California, and on April 2, 1957, said Supreme Court of the State of California denied a hearing in the above entitled case. Therefore, the District Court of Appeal's decision in this case, is the decision of the court of highest resort in the state and the matter has become final with respect thereto.

Chicago & E. I. R. Co. v. *Industrial Commission of Illinois*, 285 U. S. 296 (1932).

The jurisdiction of this court exists under 28 U. S. C. § 1257 (3), since this case presents an interpretation of federal statutes, is in conflict with the decisions of this court in the field of admiralty law, and the California State Courts have passed upon rights claimed by Petitioner under the statutes and laws of the United States.

QUESTIONS PRESENTED.

1. Does the mere filing with the Federal Maritime Board of a carrier's bill of lading, pursuant to the Intercoastal Shipping Act (46 U. S. C., §§ 844, 845b, and 801), conclusively bind a shipper to an exculpation clause in said bill of lading excusing the carrier from liability due to strike caused delays, even though the bill of lading also requires acceptance by the shipper, the shipper claims that there was fraud in the making of the contract of carriage, and the bill of lading was not delivered to the shipper until after the strike had occurred?

2. Does a shipper have the burden of proving a carrier negligent for failing to give notice to a shipper prior to loading the shipper's goods on a strike threatened ship and for actually loading said goods on a strike threatened ship under the admiralty laws of the United States as expressed by the opinions of the Supreme Court of the United States and the applicable Federal statutes?

3. Is the Harter Act (46 U. S. C., §§ 190-195) applicable in domestic commerce prior to the "loading" of a vessel, despite a statement in the carrier's bill of lading that it shall be subject to the Carriage of Goods by Sea Act (46 U. S. C., § 1312)?

STATEMENT OF THE CASE.

A. Summary.

This is an action by a shipper against a common carrier by sea in domestic commerce for substantial damages due to delay in shipment of goods caused by the carrier's failure to fulfill its obligation as a common carrier by giving the shipper notice of the possibility of delay in shipment prior to loading the shipper's goods on board ship, and by negligently loading the shipper's goods on a vessel after the carrier had knowledge of a possibility of an immediate strike, the sailors had refused to sail the vessel, and after the carrier had given notice of the risk of a strike to another shipper.

B. Facts.*

Aspen, the petitioner, required transportation from Wilmington, California to Pago Pago, American Samoa, of material for its production of a motion picture there. The carrier knew that prompt arrival was imperative. The goods were scheduled to sail on the *S. S. Sierra* on May 24, 1952.

Aspen received no notice from the carrier about any labor dispute or any possibility that the vessel would not depart on schedule until May 28, when Aspen was informed that the steamship *Sierra* was strike-bound with Aspen's material aboard.

Prior to loading Aspen's goods on the *Sierra*, the following events had occurred. The carrier and the Sailors

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*Except for the facts stated in italics for which references to the transcript are provided, the facts are taken from the statement in the opinion of the California District Court of Appeals, Appendix B, pp. A16 to A36.

Union of the Pacific were engaged in bargaining for a collective bargaining contract. The Union had adopted a resolution—communicated to defendants and immediately acted upon by the Union—that its men would refuse to sail any of defendant's vessels except those certified by the United States Military Transport Service to be carrying military cargo to Korea, and that a strike vote would be taken on May 26 unless an agreement were reached. *Accordingly defendants' vessels were in fact prevented from sailing under the terms of this resolution.* [Pltf. Exs. 47, 49, Rep. Tr. p. 459, lines 5-9; p. 804, lines 15-24; p. 806, line 24, to p. 807, line 6; p. 807, line 13, to p. 809, line 10; p. 816, line 20, to p. 817, line 4; p. 818, lines 6-15; p. 970, line 25, to p. 971, line 11.] *Defendants were also informed by the Union that the Sierra specifically would not be permitted to sail.* [Pltf. Ex. 34; Rep. Tr. p. 532, line 14, to p. 533, line 8; p. 554, lines 5-16; see deposition in evidence of Furman at p. 23, line 6, to p. 24, line 6; p. 18, line 24, to p. 20, line 23; p. 20, line 24, to p. 21, line 2; and of Carter at p. 45, line 26, to p. 46, line 15; p. 47, lines 11-26; p. 48, line 5, to p. 50, line 19.] *Defendants' agent, engaged in the collective bargaining, had not only taken formal cognizance of the work stoppage ultimatum but had rejected the Union ultimatum, recognizing in a writing that this action might result in a strike.* [Pltf. Ex. 44; Rep. Tr. p. 356, line 19, to p. 359, line 17.]

About the same time that the carrier began to load the first of Aspen's goods on the Sierra (goods were loaded on May 24, 25 and 26), *the carrier notified another shipper on the same vessel of the existing work stoppage and risk of strike, and asked that shipper whether nevertheless to proceed with preparations for loading that shipper's cargo on board.* [Deposition in evidence of Carter at p. 42, line 8, to p. 45, line 4; Rep. Tr. p. 462, line 1, to p. 464, line 12.]

Notwithstanding all of the preceding events—the carrier's recognition of the possibility of a strike; the carrier's knowledge of an existing work stoppage of the sailors affecting the *Sierra;* the carriers having given notice of the risk of strike to another shipper; the carrier's knowledge that Aspen required prompt arrival of its goods—the carrier loaded Aspen's material on the *Sierra* without giving Aspen any notice of the threatened strike or the existing work stoppage affecting the *Sierra.* It thus thrust Aspen's goods into a position of known peril without giving Aspen the opportunity to decide if it wished to accept the danger.

Later on the same day that the last of Aspen's goods were loaded on the *Sierra,* the Union voted to strike. The next day picket lines were established and maintained thereafter. Not only was the *Sierra* prevented from sailing, but no cargo could even be taken off the *Sierra* without the consent of the Union.

The bills of lading for the goods (which bills gave, the carrier the protection of various exculpatory clauses) *were not delivered to Aspen until May 28, after all of Aspen's goods had been loaded on the Sierra and the strike had commenced.* [Pltf. Ex. 59; Rep. Tr. p. 140, lines 16-26; p. 235, lines 19-24; p. 477, line 23, to p. 478, line 3; p. 565, lines 3-21; p. 876, line 9, to p. 879, line 9; p. 884, lines 6-19; p. 906, line 21, to p. 910, line 9.]

Aspen's material was tied up on the ship for a long period of time and Aspen was delayed approximately six weeks in commencing production of its motion picture while some of its employees, a part of the cast and motion picture crew, who had departed previously, waited in Samoa to its damage in excess of $126,000.00.

The case was tried before a jury which returned a 9-3 verdict in favor of the carrier, on the basis of the instruc-

tions as given. Judgment accordingly was entered (Appendix B, pp. A9 to A10). Petitioner objected to the instructions both as improper statements of the applicable federal law, and as contrary to state law. On either ground a new trial would be required.

C. Presentation of Federal Questions.

1. The First federal question presented relates to the effect of filing a carrier's bill of lading with the Federal Maritime Board pursuant to the Intercoastal Shipping Act (46 U. S. C., §§ 844, 845b, and 801) [See Appendix A, *infra*, pp. A1 to A4].

This issue was presented by the carrier in its First Affirmative Defense contained in its Answer to the Second Amended Complaint (Clk. Tr. pp. 21-22). The defense asserted that the carrier could legally contract to carry Aspen's goods only according to the terms of its bill of lading which incorporated the Carriage of Goods by Sea Act (Appendix C, *infra*, pp. A42 to A43).

Throughout the trial Aspen objected to the introduction of evidence that the bill of lading had been filed with the Federal Maritime Board on the grounds that the filing did not bind Aspen to its terms and conditions (See *e. g.*, Rep. Tr. p. 446, line 12, to p. 447, line 1, p. 448, lines 1-8; p. 708, line 1, to p. 711, line 6). Over Aspen's objections the trial court instructed the jury that the filing of the bill of lading as a part of the carrier's tariff bound Aspen to its terms and conditions (Rep. Tr. p. 994, line 1, to p. 995, line 2; p. 977, lines 12-20. Appendix C, *infra*, pp. A38 to A39). The court refused Aspen's instructions requiring the carrier to prove the actual making of the contract (Rep. Tr. p. 1014, lines 17-26; p. 1015, lines 4-21; p. 1019, lines 2-4; Appendix C, pp. A39 to A40).

Aspen raised the error of the trial court with reference to this issue, in its motion for new trial (Clk. Tr. pp. 56-62), and the trial court dealt extensively with this issue in its memorandum opinion (Clk. Tr. pp. 86-92, Appendix B, *infra*, pp. A10 to A16).

Aspen's briefs to the District Court of Appeal dealt with this issue under the major topic headings I A and I B (Appendix C, *infra*, pp. A40 to A41).

The opinion of the California District Court of Appeal likewise dealt extensively with this question (Appendix B, *infra*, pp. A10 to A16).

2. The second federal ground urged for review is the propriety of placing on the shipper the burden of proving the carrier negligent in failing to give notice of anticipated delay and loading goods on a strike bound ship, under applicable federal law and decisions of this court.

This issue was first raised in Aspen's proposed jury instructions which were refused by the trial court (Rep. Tr. p. 1011, line 18, to p. 1013, line 18; p. 1024, lines 12-20; Appendix C, *infra*, pp. A41 to A42). In lieu thereof, the trial court's instructions erroneously placed the burden of proof on the shipper (Trp. Tr. p. 992, lines 14-18. Appendix C, *infra*, p. A42).

Aspen cited this error as grounds for a new trial (Clk. Tr. pp. 65-69), and the trial court rejected it in its memorandum opinion (Clk. Tr. p. 92, lines 18-20, Appendix B, *infra*, p. A16).

Aspen urged this error before the California District Court in its Briefs under points IIA and IIB, and the opinion of that court rejected Aspen's claim that the applicable federal law had been misapplied (Appendix B, pp. A16 to A36).

3. The third federal ground, viz. that the proper federal statute which is applicable here is the Harter Act, likewise dealt with the instructions relating to the burden of proof, and was raised in conjunction with the issue discussed above. The opinion of the California District Court of Appeal specifically rejected this contention (Appendix B, *infra*, pp. A27 to A29).

REASONS FOR GRANTING THE WRIT.

A. The California Court's Decision Is in Conflict with the Decisions of This Court and of the Ninth Circuit Court of Appeals in Holding a Shipper Conclusively Bound by a Clause Which Exempted the Carrier from Liability for Strike Caused Damages Contained in a Bill of Lading Filed with the Federal Maritime Board.

Petitioner, a shipper, sued for damages from the carrier's failing to give notice of probable delay from a threatened strike, and loading the shipper's goods on board a ship on which the seamen had already given notice to the carrier that they would not work.

Respondent steamship company sought to exempt itself from liability under the provisions of its bill of lading, which was not delivered to petitioner until after the goods were loaded on the ship and the strike was in effect. Paragraph 2 of the Bill of Lading incorporated by reference the provisions of the Carriage of Goods by Sea Act. The carrier relied upon the following provision of the Carriage of Goods by Sea Act to exempt it from liability:

> "Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from * * * (j) Strikes or lockouts or stoppage or restraint of labor from whatever cause, whether partial or gen-

eral: *Provided*, That nothing herein contained shall be construed to relieve a carrier from responsibility for the carrier's own acts; * * *." 46 U. S. C., § 1304(2)(j).

This bill of lading was filed by the carrier with the United States Maritime Board, pursuant to the provisions of the Intercoastal Shipping Act (46 U. S. C., §§ 844, 845b, 801) [See Appendix A, *infra*, pp. A1 to A4], and the regulations promulgated thereunder (46 Code of Fed. Reg. 231.0(j); 231.5(g)).

Petitioner sought instructions from the trial court that the contract contained in the bill of lading (set up by Respondent as an affirmative defense) had to be proven by Respondent, and in connection with the proof of such contract, Petitioner interposed instructions raising the defense of fraud, by reason of the facts that the bill of lading was given to Petitioner after the damages sought to be exculpated had been incurred, and after Respondent knew that it could not perform the terms of carriage contained in the bill of lading (Appendix C, *infra*, pp. A37 to A43).

The trial court and the California District Court of Appeals erroneously held that the federal law provided that the mere filing by a carrier of the bill of lading with the Federal Maritime Board conclusively bound a shipper to all of the exculpation clauses contained in the bill of lading, and no defense of fraud or proof of actually making the contract of carriage was appropriate.

Accordingly, the trial court gave, and the appellate court affirmed, an instruction that the petitioner (a shipper) was conclusively bound by the terms of the filed bill of lading providing exemption from damages caused by strike (See Appendix C, *infra*, pp. A38 to A39).

This instruction rested solely on the misconstruction of the federal statutes. This is manifest from the opinions

of the trial and appellate courts (Appendix B, *infra*, pp. A10 to A36). Also it is clear by reason of the otherwise applicable state law. For, absent this federal statute, Petitioner could have objected to the effect of the claimed contract on the grounds of fraud in that the carrier when it delivered the bill of lading knew that it could not perform its agreement to deliver the cargo in Samoa, as it had previously represented to the shipper. In California, one who learns that his statements, even if believed to be true when made, have become false through a change of circumstances, is guilty of fraud if he fails to disclose the new conditions to the party relying on the original representations before the relying party has acted upon the original representations.

> *Stevens* v. *Marco.*, 147 A. C. A. 451, 473, 305 P. 2d 699 (1956), hear. den. 48 A. C. No. 1, Minutes, p. 2 (1957).

Petitioner submits that the decision by the California Court is in conflict with the decisions of this court, the Ninth Circuit Court of Appeals and other federal courts.

> *New York, N. H. & H. R. Co.* v. *Nothnagle*, 346 U. S. 128, 135-136 (1953).
>
> *Pacific S. S. Co.* v. *Cackette*, 8 F. 2d 259 (9th Cir., 1925), cert. den. 269 U. S. 586 (1926).
>
> *Bernard* v. *U. S. Aircoach*, 117 F. Supp. 134 (D. C. S. D. Calif. 1953).

These federal decisions hold that only those provisions in the carrier's filed tariff, which change, affect or determine rates are binding upon the shipper. Since the clause exonerating the carrier from liability for strike-caused loss did not change, affect or determine rates, Petitioner should not have been constructively bound by it in the absence of proof of actually accepting the contract of carriage.

In *New York, N. H. & H. R. Co.* v. *Nothnagle, supra,* this court held that despite a tariff filed with the Interstate Commerce Commission limiting liability of the railroad for lost luggage, the railroad was liable for the actual value of the baggage lost. This Court said:

> "But only by granting its customers a fair opportunity to choose between higher or lower liability by paying a correspondingly greater or lesser charge can a carrier lawfully limit recovery to an amount less than the actual loss sustained. * * *
>
> "The great object of the law governing common carriers was to secure the utmost care in the rendering of a service of the highest importance to the community. A carrier who stipulates not to be bound to the exercise of care and diligence 'seeks to put off the essential duties of his employment.' It is recognized that the carrier and the individual customer are not on an equal footing. 'The latter cannot afford to higgle or stand out and seek redress in the courts.' (citing case). In sum, respondent cannot be held bound by petitioner's limitation, and the judgment of the Connecticut Superior Court of Errors must be affirmed."

In the *Pacific S. S. Co.* case, *supra,* a provision in a filed tariff required a passenger who claimed damages to file a claim with the carrier within ten days after landing. The plaintiff passenger, in a suit for personal injuries incurred in passage, had failed to do so. In affirming judgment for the passenger, the Ninth Circuit Court of Appeals reasoned: (1) only those portions of the tariff which the law requires to be filed are binding on the passenger; (2) the law required filing only of those provisions which change or determine rates; (3) since this time limitation provision had no perceptible relation to rates for transportation, it was not binding upon the passenger.

The state Courts here committed two errors. First, they relied upon dicta in the *Pacific Steamship Co.* case, *supra*, which stated:

> "Rates for passenger transportation may be, as the court found in the Hooker Case, directly affected by the degree of the carrier's responsibility for safe carriage and delivery of baggage * * *." (at 8 F. 2d 261).

This dicta has no force here. This court, in *New York, N. H. & H. R. Co.* v. *Nothnagle, supra*, expressly distinguished the case of *Boston & Maine R.* v. *Hooker*, 233 U. S. 97 (1914); on the grounds that it dealt with *free* baggage, the carrier gave *actual notice* of its limitation of liability to the customer, and the shipper had a *choice of avoiding the limitation* of liability by paying a higher rate. None of these elements are present in the instant case. Here the goods being carried were fully paid for, there was no choice of avoiding the limitation of liability due to the strike by paying a different rate, and the question of notice was not submitted to the jury, for the instruction stated that the shipper was conclusively bound by the terms of the bill of lading by constructive notice.

The State Courts committed a second error in turning the decision upon whether the exemption in the filed tariff was substantive or procedural, and in, therefore, distinguishing *Pacific S. S. Co.* v. *Cackette, supra*, on the ground that it dealt with procedural limitations. This court has itself recognized in *Guaranty Trust Co. of N. Y.* v. *York*, 326 U. S. 99 (1945), that characterization of periods of limitations as procedural has no meaning in solving particular problems. Under the Intercoastal Shipping Act, the effect to be given a provision in a filed tariff does not depend on whether the provisions are substantive or procedural, but on whether the provision changes the rates (46 U. S. C., § 844). It is submitted that if a shipper was

given a choice of different periods of limitations within which to bring an action dependent upon paying different rates, then such a provision would be binding on the shipper, irrespective of its characterization as substantive or procedural (See: *Western Union Tel. Co.* v. *Esteve Bros. & Co.*, 256 U. S. 566 (1921)). In the present case the absence of this choice should have produced the opposite decision.

The present case falls squarely in the rule of the cases above cited, and the decision of the state court is in conflict with the proper federal rule. Here the exoneration clause had no perceptible relation to the rates and charges for transportation, as in the *Pacific Steamship* case, *supra*, and here no alternative is offered to the shipper to delete the provisions in exchange for higher rates, as in *New York, N. H. & H. R. Co.* v. *Nothnagle, supra.*

The proper determination of this issue by this Honorable Court is of the utmost importance to the transportation of goods by sea under this statute. The contract of carriage for every item carried in the hold of numerous ships, sent aboard by hundreds of thousands of shippers a year, is dependent upon the court's interpretation of the federal statute here involved. The bills of lading delivered by the carrier purporting to represent the contract contain provisions printed in such small type on their reverse side that only under magnification are they readily readable. If carriers can impose contracts on shippers without actual notice, in the face of fraudulent conduct, and without giving any alternative of rates for varying stipulations, merely by filing an onerous tariff in the archives of the Federal Maritime Board, the shipper is at the mercy of carriers, and the carriers' protection is virtually limited only by the ingenuity of their attorneys to conjure exceptions to liability.

The instant case is an extreme demonstration of what can happen. The shipper became subject, under a term in fine print on the reverse side of a bill of lading (which bill he had never seen), to a provision in the Carriage of Goods by Sea Act (which was incorporated by reference in the bill of lading but not even printed therein), merely by the carriers' filing of this bill of lading with the Federal Maritime Board as a part of its tariff. As a result of this statutory construction, the shipper lost the benefit of a defense of fraud, and the burden of proving the negligence of the carrier shifted from the carrier to the shipper. All this in direct conflict with the express holding of this court to the contrary in *New York, N. H. & H. R. Co.* v. *Nothnagle,* 346 U. S. 128, 135-136 (1953), that:

> "The great object of the law governing common carriers was to secure the utmost care in the rendering of a service of the highest importance to the community."

B. This State Court Decision Is in Direct Conflict with the Decisions of This Court in Placing the Burden of Proving a Carrier's Antecedent Negligence on a Shipper.

1. The Federal Admiralty Rules govern an action in state court adjudicating rights in admiralty.

Respondent has conceded throughout this case (Resp. Rep. Br. p. 4, Resp. Ans. to Pet. for Hearing, pp. 1-2) that federal maritime law is a governing body of law. Petitioner believes that the decision below was in violation of both state and federal maritime law, but of course only the latter is material in this petition, and error in either requires a new trial.

This court has frequently stated that irrespective of state law, in the field of admiralty state courts must fol-

low the federal admiralty rules which have been firmly established by this court.

Union Fish Co. v. *Erickson*, 248 U. S. 308 (1919).

Southern Pacific Co. v. *Jensen*, 244 U. S. 205, 215 (1917).

Knickerbocker Ice Co. v. *Stewart*, 253 U. S. 149, 159-161 (1920).

The Lottawanna, 21 Wall. 558 (1874).

Chelentis v. *Luckenbach S. S. Co.*, 247 U. S. 372 (1918).

Garrett v. *Moore-McCormack Co.*, 317 U. S. 239, 244 (1942).

And See:

Wilburn Boat Co. v. *Fireman's Fund Ins. Co.*, 348 U. S. 310 (1955).

Even in the *Wilburn* case, *supra*, despite a holding that there was no federal rule there applicable and the court's declining to make one to govern maritime insurance contracts, the majority (at p. 314), the concurring (at p. 322), and the dissenting (at p. 327) opinions all agree that state courts in enforcing maritime or admiralty rights must do so according to federal admiralty law, including that expressed in judicial opinions of this court.

2. The state court's decision is in conflict with federal admiralty law in placing on the shipper the burden of proving the carrier negligent in failing to give a shipper notice of a delay in sailing.

Petitioner alleged that a Cause of its damages was the Carrier's failure to Notify Petitioner (as it had done for another shipper, Rep. Tr. p. 462, line 18, to p. 464, line 12; p. 533, line 9; p. 539, lines 3-5; Deposition of Carter, in evidence, p. 42, line 8, to p. 45, line 4); of an anticipated delay in sailing due to an existing work stoppage and potential strike. (Clk. Tr. pp. 7-8, p. 12).

Not even Respondents claim that the duty to give the notice was excused by any exculpatory language of the bill of lading.

Yet the trial court gave, and the Appellate court affirmed, Instructions placing on the shipper the burden of proving the carrier's negligence in failing to give notice. (See Appendix C, *infra*, pp. A37 to A43).

This is in direct conflict with the Admiralty rule placing the burden on this issue upon the carrier.

Armour Grain Co. v. *Compagnie Generale Transatlantique*, 26 F. 2d 739, 740 (D. C. S. D. N. Y., 1925), aff'd 26 F. 2d 741 (2nd Cir., 1928).

Copper River Packing Co. v. *Alaska S. S. Co.*, 22 F. 2d 12 (9th Cir., 1927).

And See:

Eastern Railway v. *Littlefield*, 237 U. S. 140, 145 (1915).

In *Armour Grain Co., supra*, the court held a shipper of wheat entitled to damages from a delay in sailing caused by the repair of the ship's machinery, expressly placing on the carrier the burden of proving by a preponderance of the evidence that it gave notice to the shipper of the delay.

The decision of this court in *Eastern Railway, supra*, was an application of this rule in the field of railroad carriers. The court there stated that the giving of notice was a condition precedent to a carrier's raising even a valid excuse for delay. In holding the carrier liable for damages to the shipper of cattle for failure to provide or give notice even though the failure was due to a rush of orders, this court stated (at p. 145):

"But where, without fault on its part, a carrier is unable to perform a service due and demanded, it

must promptly notify the shipper of its inability, *otherwise the reception of goods without such notice will estop the carrier from setting up what would otherwise have been a sufficient excuse* for refusing to accept the goods or for delay in shipment after they have been received." (Emphasis added).

The decision of the California District Court of Appeals, in affirming the erroneous instructions, does not even deal with this issue in terms of the applicable law, despite the fact that it was strongly urged and the cases above cited were discussed in Petitioner's briefs below (Opening Br. pp. 34-38, 50-51, 77; Answering Br. pp. 19-20; 35).

This opinion, which places the California Court in direct conflict with the decisions of the Second and Ninth Circuit Courts of Appeal, and with the rule as expressed by this court, is of the utmost importance. The delineation of the duty of a carrier by water to give notice in the face of an anticipated delay—whether by strike or otherwise—is of importance to all carriers and shippers by water. If the rule is, as Petitioner believes, that notice must be given, then when a delay is threatened a carrier will give notice to its shippers and allow those to whom time is important to make other arrangements. This will not only provide justice in this case, but will prevent harm in innumerable future situations which may thereby never have to come before the courts.

3. This decision is in direct conflict with the admiralty decisions of this court requiring a carrier by water to establish that the exempt cause was the actual cause of the injury, before any burden of proof shifts to the shipper.

Petitioner alleged that its damage was not caused by the strike, but by the Carrier's prior negligence in not

giving notice of the likelihood of delay and in loading the goods on board a ship subject to strike delay (Clk. Tr. p. 12, lines 1-20).

The carrier claimed that the strike—an exempted contingency was the cause of the damages.

Without submitting the issue of the causation to the jury, the District Court and the Trial Court (Appendix B, *infra*, pp. A10 to A43) merely assumed that the strike caused the damages.

This is in direct conflict with the decisions of this court and many Circuit Courts of Appeal, that when there is a dispute as to which of the possible causes was the immediate cause of the loss, the burden is on the carrier to establish that the immediate cause of the loss was from the exempted circumstances. Even respondents did not contend that the burden of proof of negligence shifts to the shipper before this.

Schnell v. *The Vallescura*, 293 U. S. 296 (1934).

Commercial Corp. v. *N. Y. Barge Corp.*, 314 U. S. 104, 109 (1941).

Waterman S. S. Corp. v. *U. S. Smelting, etc., Co.*, 155 F. 2d 687 (5th Cir., 1946), cert. den. 329 U. S. 761.

Edmond Weil v. *American West African Line*, 147 F. 2d 363 (2nd Cir., 1945).

Ore Steamship Corp. v. *D/S A/S Hassel*, 137 F. 2d 326 (2nd Cir., 1943).

Wessels v. *The Austurius*, 126 F. 2d 999 (2nd Cir., 1942).

For example in *Schnell* v. *The Vallescura*, *supra*, a cargo of onions spoiled from lack of proper ventilation. The vessel claimed exemption due to decay and perils of the sea. It was not clear how much of the damage was due to the exempt causes. This court held:

> "In general the burden rests upon the carrier of goods by sea to bring himself within any exception relieving him from liability which the law otherwise imposes on him. * * * The reason for the rule is apparent. He is a bailee entrusted with the shipper's goods, with respect to the care and safe delivery of which the law imposes upon him an extraordinary duty. Discharge of the duty is peculiarly within his control. All the facts and circumstances upon which he may rely to relieve him of that duty are peculiarly within his knowledge and usually unknown to the shipper. In consequence, the law casts upon him the burden of the loss which he cannot explain, or, explaining, bring within the exceptional case in which he is relieved from liability." (at pp. 303-304).

In this case, the California courts have established the unique rule that if one of the possible causes of damage is a strike, the usual rule applicable to the carrier's burden of proof is disregarded and the burden is placed upon the shipper to prove the carrier's negligence. To give the carrier additional protection in the case of a strike is even the more improper, since it could have conceivably avoided the strike by adjusting its dispute with its seamen, while in the other types of loss the carrier was usually unaware of the possibility that any change in its conduct could have forestalled the damage.

4. The state court is in conflict with the decisions of this court in placing on the shipper the burden of proving that the carrier was negligent, antecedent to the occurrence of the excepted cause.

Even assuming, solely for purpose of this argument—and not conceding—that the damage was caused by a strike, and furthermore that under the bill of lading the strike was an excepted cause, the decisions of this Court have made it clear that a carrier must prove itself free

from negligence contributing to the damage prior to the occurrence of the excepted cause. This is merely an expression of the legal axiom "No one can take advantage of his own wrong." The carrier cannot thrust goods into a strike situation and then take advantage of its careless action to say that the burden of proof is shifted to the shipper as to the antecedent negligence because the antecedent negligence placed the goods in a position where they were damaged by an excepted cause.

Commercial Corp. v. *N. Y. Barge Corp.*, 314 U. S. 104, 109 (1941).

The Edwin I. Morrison, 153 U. S. 199, 211 (1894).

In the latter case, this court affirmed recovery by the shipper for damages by sea water to a cargo of guano over the claim of the carrier that the damage was due to an excepted cause, "peril of the sea." The court made it clear that before the carrier could avail itself of this exempted cause, the carrier had to prove itself free from prior negligence which contributed to the loss.

In *Commercial Corp.* v. *N. Y. Barge Corp.*, *supra*, this court was dealing with the liability of a private carrier. In comparing the rule of the liability of the private carrier with that of the public carrier, the court stated the burden of proof of the common carrier as follows:

> "One who has assumed the obligation of a common carrier can relieve himself of liability for failing to carry safely only by showing that the cause of loss was within one of the narrowly restricted exceptions which the law itself annexes to his undertaking or for which it permits him to stipulate. The burden rests upon him to show that the loss was due to an excepted cause *and that he has exercised due care to avoid it* * * *." (at 314 U. S. 109, emphasis added).

Again it seems incredible that the California courts should create an exception in the case of strike situations.

The California court opinion in the following language, can not be permitted to stand as an applicable expression of Admiralty law in the face of the decisions of this Court. The California Court stated:

> "Under the express provisions of the bill of lading and COGSA [Carriage of Goods by Sea Act], defendants were exempt from liability for damages caused by such delay [delay in sailing due to the strike] unless plaintiff proved that the defendants' negligence contributed to the damage." (Appendix B, *infra*, p. A29).

As this court has recognized on prior occasions, to place this burden of proof on a shipper is virtually to give the carrier the judgment, for all of the facts and circumstances of the occurrences are in the possession of the carrier, and it is virtually impossible for the shipper to discover them, adequately to sustain a burden of proof.

5. The state court's decision on these federal issues was material to the outcome of the case.

Each of these points of law relate directly to the propriety of instructions governing the burden of proof. Without doubt if the state court erred, in instructing the jury as to the proper burden of proof under Admiralty law, a new trial would have to have been granted under state law, for this would have been the most clear prejudicial error.

C. In an Extremely Important Question of Admiralty Law Never Passed upon by This Court, the California Court Ruled That the Harter Act Has No Application to the Duties of a Carrier, Adding Further Confusion to the Conflict Between Circuit Courts.

1. How the issue is presented.

The Harter Act (46 U. S. C., §§ 190-198) was enacted in 1893,* and until 1936 when the Carriage of Goods by Sea Act was passed by Congress (46 U. S. C., §§ 1300-1316), generally governed contracts of carriage and liability of carriers by sea.

The Carriage of Goods by Sea Act (hereafter referred to as COGSA) did not repeal the Harter Act, but expressly left it in force except during the period of carriage by sea (46 U. S. C., § 1311).

COGSA does not Apply by its own force to this situation. By its own terms it only covers the period between the time the goods are taken by the ship's tackle to the time they are discharged from the ship. The act defines the term "carriage of goods" to cover "The period from when the goods are loaded on to the time when they are discharged from the ship." (46 U. S. C., § 1301(b)(e), see Appendix A, *infra*, p. A7). COGSA does not apply to domestic commerce (This shipment was between the American mainland and American Samoa) unless made so by contract, and then only "as fully as if subject hereto by the express provisions of this Act * * *" (46 U. S. C., § 1312). Petitioner has claimed that the provision incorporating COGSA in the bill of lading was ineffective here (see argument *Supra* under A). But even if it is ap-

*Sections of the Harter Act hereinafter discussed are set forth in full in Appendix A, *infra*, pp. A5 to A6).

plicable, it still is only as applicable as if this were an international shipment, and therefore the Act does not apply as a federal statute prior to the time the goods are loaded on board. The bill of lading sought to extend the provisions of the act to the period prior to the loading on board (Exhibit D, p. 5, Appendix C, *infra*, pp. A37 to A43). But if it applies during this period at all, it does so merely as a contractual provision and not as a federal statute.

Thus the question was presented, does the Harter Act apply to the period prior to loading, and if so, is there a conflict between the provisions of the Harter Act and the contractual provisions incorporating COGSA as a contract to cover the period prior to loading.

2. The Harter Act applies to the period prior to loading.

The California District Court of Appeals held that (1) The Harter Act is superseded by COGSA in domestic commerce at the option of the carrier, and (2) the Harter Act does not apply until the vessel "breaks ground" to start her voyage (Appendix B, *infra*, p. A28).

The first conclusion is manifestly wrong and is made without the citation of any authority. The provision in COGSA which permits its application to domestic commerce by contract stipulation in the bill of lading, only permits its application "as fully as if subject hereto by the express provisions of this Act. * * *" (46 U. S. C., § 1312, Appendix A, *infra*, pp. A7 to A8). The domestic option does not allow the act to be incorporated on terms *more* fully (i. e., prior to loading) than if subject directly by law to foreign carriage—only *as* fully. The law is clear and the cases and authorities which have discussed this problem are unanimous in this conclusion.

46 U. S. C., § 1311.

Remington Rand, Inc., v. *American Export Lines*, 132 F. Supp. 129 (D. C. S. D. N. Y., 1955).

The Monte Iciar, 167 F. 2d 334, 336 (3rd Cir., 1948).

I *Benedict on Admiralty*, 6th Ed., Revised by Arnold Witman Knauth, Sec. 95, p. 287.

As the latter treatise said, and was quoted with approval in *The Monte Iciar, supra*:

> "In foreign trade under bill of lading *and in these domestic trades where the carrier has elected to carry under the 1936 Act* [Carriage of Goods by Sea Act], the Harter Act has no longer any effect from the moment when the goods are loaded on until the moment when they are discharged from the vessel; *it still has such effect as may be prior to the loading* and subsequent to the discharge of the goods" (Emphasis added).

It is virtually impossible to conceive of any other interpretation of the statute. Section 11 of COGSA provides:

> "§1311. Liabilities before loading and after discharge; effect on other laws.
>
> "*Nothing in this chapter* or section 25 of Title 49 *shall be construed as superceding any part of sections 190-195 of this title*, or of any other law which would be applicable in absence of this chapter or section 25 of title 49, insofar as they relate to the duties, responsibilities, and liabilities of the ship or carrier *prior to the time when the goods are loaded on* or after the time they are discharged from the ship." (Emphasis added).
>
> 46 U. S. C., §1311.

The statute expressly preserves the effect of the Harter Act prior to loading.

The second conclusion of the California court is likewise in error. The above quotation points out the view of the major treatise in the Admiralty field and of the 3rd Circuit that the Harter Act does apply prior to loading. This is in direct conflict with the California court's position, that the Harter Act only applies after the vessel breaks ground. For if the Harter Act only applies when the vessel leaves dock, it obviously can not apply prior to loading. In effect the California Court has done what the Congress in passing COGSA chose not to do. It has repealed the Harter Act.

The very language of the Harter Act makes it clear that it must apply to the period prior to the time the vessel breaks ground, because many of its provisions apply to events which must occur before the ship breaks ground. Thus 46 U. S. C. 190 provides that it is unlawful to insert in a bill of lading or other shipping document any clause relieving the carrier from liability for loss or damage arising from negligence "in proper loading, stowage, custody * * *" of cargo. Section 191 likewise prohibits including in a bill of lading any provisions lessening or avoiding the duty of the carrier to exercise due diligence in properly equipping, manning, provisioning and outfitting the vessel, and making it seaworthy and capable of performing her intended voyage. Finally, Section 194 provides penalties for the violation of the preceding sections. If the Harter Act had no effect until after the ship breaks ground, then all of these provisions relating to actions that the carrier must take prior to sailing are meaningless, as are all of the provisions relating to the proper terms to be included in a bill of lading (unless, of course the bill of lading happens to be issued only after the vessel breaks ground). Thus, the California Court has read the Harter Act to attribute to Congress the intent to make substantial portions of the Act meaningless.

The California court accomplished this despite the clear language of 46 U. S. C., §1311, a portion of COGSA (quoted in full *supra*), which in its title refers to "Liabilities before loading," and in the next points out that nothing in COGSA shall affect the Harter Act's imposition of duties, responsibilities and liabilities on the carrier "prior to the time when the goods are loaded on."

This result by the California Court was by misreading language in *The Newport*, 7 F. 2d 452 (9th Cir., 1925), and Knauth, on *Ocean Bills of Lading*, Fourth Edition, pp. 163, 166. Knauth, author of the latter authority, is the same. Knauth, who is editor of the edition of *Benedict on Admiralty*, quoted from above. The seeming conflict between the quotation and his statement in the latter work (found also in *The Newport, supra*), to the effect that the Harter Act related to the time the vessel breaks ground, arises from a misunderstanding of the context in which the language is applied. What *The Newport, supra*, holds is that certain portions of the Harter Act—those which provide exemptions for the carrier—are applicable if the ship meets the test of being seaworthy. And the time that the test of the ship being seaworthy is made, is when the ship breaks ground. Thus *The Newport, supra*, held that since the carrier failed to show that the ship was seaworthy at the time the ship broke ground, the carrier was not entitled to exemptions set forth in the Harter Act.

It is a fallacy of reasoning—and one which flies in the face of the language of the act—to say that, since the *carrier* does not get exemptions in the act *applicable after the voyage has commenced* unless his ship is seaworthy at the time the ship breaks ground, the provisions for the protection of the *shipper*, which relate to *conduct prior to sailing*, are of no force unless the ship breaks ground.

The apparent conflict in language between the circuit courts of the third and ninth Circuits, and the clear conflict between the Third Circuit and the present opinion of the California Court can only be resolved by granting this petition.

3. The question of the applicability of the Harter Act is material here because the Harter Act precluded the giving of the instructions here given.

The California Court upheld instructions placing the burden of proof of the carrier's negligence on the shipper without the carrier's having shown that it had fulfilled the conditions of the Harter Act.

The Harter Act specifically provides that a carrier may not avail itself of any contractual or statutory exemptions unless it has used due diligence to properly man the vessel (46 U. S. C., § 192). Any agreement lessening, weakening or avoiding the carrier's obligation to exercise due diligence to properly man the vessel, or impairing the obligations of the master, officers, agents or servants of the carrier to carefully handle, care for and properly deliver the cargo are expressly invalidated (46 U. S. C., § 191).

Therefore, until the carrier proved it had used due diligence to obtain men who would not strike (here the strikers were signed to shipping articles prior to the strike) it can not seek exemption under the provision limiting its damages from causes contributed to by a strike of these men.

See:

Spencer Kellogg & Sons v. *Great Lakes Transit Corp.*, 32 F. Supp. 520 (D. C. E. D. Mich., 1940).

In this last cited case the carrier was held liable for the failure of the crew to exercise due diligence in the use of the equipment of the vessel *before* and at the beginning of the voyage, there the Carriage of Goods by Sea Act was incorporated by reference in the bills of lading.

Thus, the burden of proving that the carrier had not exercised due care in manning the vessel and had not carefully handled and cared for the cargo prior to loading and in loading on a strike threatened ship were placed on the shipper. If the California Court had—as was proper—regarded the Harter Act as in force, it should have required the carrier to bear the burden of proving it had used due care under the circumstances.

Again, the shifting of the burden of proof to the shippers in situations such as these is not only an injustice to the Petitioner here, but establishes a law which virtually insures the carrier of judgment, due to the inability of shippers to obtain sufficient facts (which the carrier has access to) to prove to a judge or jury that it has satisfied its burden of proof.

Here too, the federal ground—erroneously decided by the California Court—alone would require a different disposition of this case. For, an erroneous instruction on this burden of proof would require a new trial.

SUMMARY AND CONCLUSION.

This case presents this Honorable Court with a Cross section of the Fundamental problems involving the respective rights of a carrier and a shipper in maritime contracts.

First, what are the proper limits of liability to which a carrier may stipulate without actual notice and consent of a shipper merely by the carrier's filing its bill of lading with the Federal Maritime Board.

Secondly, whose is the burden of proving the existence or freedom from negligence for conduct prior to the actual occurrence of damages to which an exempted cause has contributed.

Finally, what is the applicable federal statute to govern the relations between carrier and shipper prior to the loading of the goods on board a ship.

By granting certiorari in this case, this Court can correct the serious conflicts created by this State decision with the existing Admiralty law, and authoritatively delimit the obligations of a carrier for its conduct prior to the sailing of a vessel. Such a decision would be of immense value to the entire shipping community composed of both shippers and carriers. It could put at rest innumerable future disputes on the basis of the law as announced in this case. Each strike of seamen or dock workers alone, must produce hundreds of conflicts such as are presented by this case, and there are innumerable other causes for delays in shipping (mechanical failure, international crises such as the Suez, and stormy weather) which likewise affect many thousands of shipments and give rise to similar cases.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A.

Applicable Statutes Discussed in Text.

46 U. S. C., Sec. 801: Terms defined.

When used in this chapter:

The term "common carrier by water in foreign commerce" means a common carrier, except ferryboats running on regular routes, engaged in the transportation by water of passengers or property between the United States or any of its Districts, Territories, or possessions and a foreign country, whether in the import or export trade: *Provided,* That a cargo boat commonly called an ocean tramp shall not be deemed such "common carrier by water in foreign commerce."

The term "common carrier by water in interstate commerce" means a common carrier engaged in the transportation by water of passengers or property on the high seas or the Great Lakes on regular routes from port to port between one State, Territory, District, or possession of the United States and any other State, Territory, District, or possession of the United States, or between places in the same Territory, District or possession.

The term "common carrier by water" means a common carrier by water in foreign commerce or a common carrier by water in interstate commerce on the high seas or the Great Lakes on regular routes from port to port.

The term "other person subject to this Act" means any person not included in the term "common carrier by water," carrying on the business of forwarding or furnishing wharfage, dock, warehouse, or other terminal facilities in connection with a common carrier by water.

The term "person" includes corporations, partnerships, and associations, existing under or authorized by the laws of the United States, or any State, Territory, District, or possession thereof, or of any foreign country.

The term "vessel" includes all water craft and other artificial contrivances of whatever description and at whatever stage of construction, whether on the stocks or launched, which are used or are capable of being or are intended to be used as a means of transportation on water.

The term "documented under the laws of the United States," means "registered, enrolled, or licensed under the laws of the United States." Sept. 7, 1916, c. 451, sec. 1, 39 Stat. 728; July 15, 1918, c. 152, sec. 1, 40 Stat. 900.

46 U. S. C., Sec. 844. Schedule of rates; filing; posting; penalties for violations.

Every common carrier by water in intercoastal commerce shall file with the United States Maritime Commission and keep open to public inspection schedules showing all the rates, fares, and charges for or in connection with transportation between intercoastal points on its own route; and, if a through route has been established, all the rates, fares, and charges for or in connection with transportation between intercoastal points on its own route and points on the route of any other carrier by water. The schedules filed and kept open to public inspection as aforesaid by any such carrier shall plainly show the places between which passengers and/or freight will be carried, and shall contain the classification of freight and of passenger accommodations in force, and shall also state separately each terminal or other charge, privilege, or facility, granted or allowed, and any rules or regulations which in anywise change, affect, or determine any part or the aggregate of such aforesaid rates, fares or charges, or the

value of the service rendered to the passenger, consignor, or consignee. Such carriers in establishing and fixing rates, fares, or charges may make equal rates, fares, or charges for similar service between all ports of origin and all ports of destination, and it shall be unlawful for any such carrier, either directly or indirectly, through the medium of any agreement, conference, association, understanding, or otherwise, to prevent or attempt to prevent any such carrier from extending service to any publicly owned terminal located on any improvement project authorized by the Congress at the same rates which it charges at its nearest regular port of call. Such schedules shall be plainly printed, and copies shall be kept posted in a public and conspicuous place at every wharf, dock, and office of such carrier where passengers or freight are received for transportation, in such manner that they shall be readily accessible to the public and can be conveniently inspected.

No change shall be made in the rates, fares, or charges, or classifications, rules, or regulations, which have been filed and posted as required by this section, except by the publication, filing, and posting as aforesaid of a new schedule or schedules which shall become effective not earlier than thirty days after date of posting and filing thereof with the commission, and such schedule or schedules shall plainly show the changes proposed to be made in the schedule or schedules then in force and the time when the rates, fares, charges, classifications, rules, or regulations as changed are to become effective: *Provided,* That the commission may, in its discretion and for good cause, allow changes upon less than the period of thirty days herein specified: *And provided further,* That schedules or changes which provide for extension of actual service to additional ports at rates of said carrier already in effect for similar service at the nearest port of call to said ad-

ditional ports shall become effective immediately upon notice to the commission.

From and after ninety days following March 3, 1933, no person shall engage in transportation as a common carrier by water in intercoastal commerce unless and until its schedules as provided by this section have been duly and properly filed and posted; nor shall any common carrier by water in intercoastal commerce charge or demand or collect or receive a greater or less or different compensation for the transportation of passengers or property or for any service in connection therewith than the rates, fares, and/or charges which are specified in its schedules filed with the commission and duly posted and in effect at the time; nor shall any such carrier refund or remit in any manner or by any device any portion of the rates, fares, or charges so specified, nor extend or deny to any person any privilege or facility, except in accordance with such schedules.

The commission shall by regulations prescribe the form and manner in which the schedules required by this section shall be published, filed, and posted; and the commission is authorized to reject any schedule filed with it which is not in consonance with this section and with such regulations. Any schedule so rejected by the commission shall be void and its use shall be unlawful.

Any violation of any provision of this section by a common carrier by water in intercoastal commerce shall be punished by a fine of not less than $1,000 nor more than $5,000 for each act of violation and/or for each day such violation continues, to be recovered by the United States in a civil action. Mar. 3, 1933, c. 199, sec. 2, 47 Stat. 1425; Ex. Ord. No. 6166, sec. 12, June 10, 1933; June 29, 1936, c. 858, secs. 204, 904, 49 Stat. 1987, 2016.

46 U. S. C., Sec. 845b. Application to common carrier by water in interstate commerce:

The provisions of this chapter are extended and shall apply to every common carrier by water in interstate commerce, as defined in section 801 of this title. Mar. 3, 1933, c. 199, sec. 5, as added June 23, 1938, c. 600, sec. 43(a), 52 Stat. 964.

46 U. S. C., Sec. 190. Stipulations relieving from liability or negligence. It shall not be lawful for the manager, agent, master, or owner of any vessel transporting merchandise or property from or between ports of the United States and foreign ports to insert in any bill of lading or shipping document any clause, covenant, or agreement whereby it, he, or they shall be relieved from liability for loss or damage arising from negligence, fault, or failure in proper loading, stowage, custody, care, or proper delivery of any and all lawful merchandise or property committed to its or their charge. Any and all words or clauses of such import inserted in bills of lading or shipping receipts shall be null and void and of no effect. (Feb. 13, 1893, c. 105, sec. 1, 27 Stat. 445.)

46 U. S. C., Sec. 191. Stipulations relieving from exercise of due diligence in equipping vessels. It shall not be lawful for any vessel transporting merchandise or property from or between ports of the United States of America and foreign ports, her owner, master, agent, or manager, to insert in any bill of lading or shipping document any covenant or agreement whereby the obligations of the owner or owners of said vessel to exercise due diligence* properly equip, man, provision, and outfit said vessel, and to make said vessel seaworthy and capable of

*The word "to" should probably be inserted though it was not in the original act as published in the Statutes at Large.

performing her intended voyage, or whereby the obligations of the master, officers, agents, or servants to carefully handle and stow her cargo and to care for and properly deliver same, shall in any wise be lessened, weakened, or avoided. (Feb. 13, 1893, c. 105, sec. 2, 27 Stat. 445.)

46 U. S. C., Sec. 193. Bills of lading to be issued; contents. It shall be the duty of the owner or owners, masters, or agent of any vessel transporting merchandise or property from or between ports of the United States and foreign ports to issue to shippers of any lawful merchandise a bill of lading, or shipping document, stating, among other things, the marks necessary for identification, number of packages, or quantity, stating whether it be carrier's or shipper's weight, and apparent order or condition of such merchandise or property delivered to and received by the owner, master, or agent of the vessel for transportation, and such document shall be prima facie evidence of the receipt of the merchandise therein described. (Feb. 13, 1893, c. 105, sec. 4, 27 Stat. 445.)

46 U. S. C., Sec. 194. Penalties; lien; recovery. For a violation of any of the provisions of the four preceding sections the agent, owner, or master of the vessel guilty of such violation, and who refuses to issue on demand the bill of lading provided for, shall be liable to a fine not exceeding $2,000. The amount of the fine and costs for such violation shall be a lien upon the vessel, whose agent, owner, or master is guilty of such violation, and such vessel may be libeled therefor in any district court of the United States, within whose jurisdiction the vessel may be found. One-half of such penalty shall go to the party injured by such violation and the remainder to the Government of the United States. (Feb. 13, 1893, c. 105, sec. 5, 27 Stat. 446.)

46 U. S. C., Sec. 1301. Definitions.

* * * * * * *

(b) The term "contract of carriage" applies only to contracts of carriage covered by a bill of lading or any similar document of title, insofar as such document relates to the carriage of goods by sea, including any bill of lading or any similar document as aforesaid issued under or pursuant to a charter party from the moment at which such bill of lading or similar document of title regulates the relations between a carrier and a holder of the same.

* * * * * * *

(e) The term "carriage of goods" covers the period from the time when the goods are loaded on to the time when they are discharged from the ship. Apr. 16, 1936, c. 229, sec. 1, 49 Stat. 1208.

46 U. S. C., Sec. 1312. Scope of chapter; "United States"; "foreign trade."

This chapter and section 25 of Title 49 shall apply to all contracts for carriage of goods by sea to or from ports of the United States in foreign trade. As used in this chapter and section 25 of Title 49 the term "United States" includes its districts, territories, and possessions: *Provided, however,* That the Philippine Legislature may by law exclude its application to transportation to or from ports of the Philippine Islands. The term "foreign trade" means the transportation of goods between the ports of the United States and ports of foreign countries. Nothing in this chapter and section 25 of Title 49 shall be held to apply to contracts for carriage of goods by sea between any port of the United States or its possessions, and any other port of the United States or its possessions: *Provided, however,* That any bill of lading or similar document of title which is evidence of a contract for the carriage of goods by sea

between such ports, containing an express statement that it shall be subject to the provisions of this chapter and section 25 of Title 49, shall be subjected hereto as fully as if subject hereto by the express provisions of this chapter and section 25 of Title 49: *Provided further*, That every bill of lading or similar document of title which is evidence of a contract for the carriage of goods by sea from ports of the United States, in foreign trade, shall contain a statement that it shall have effect subject to the provisions of this chapter and section 25 of Title 49. Apr. 16, 1936, c. 229, sec. 13, 49 Stat. 1212.

APPENDIX B.

Judgment and Opinions Below.

1. Judgment appealed from.

Filed June 13, 1955. Harold J. Ostly, County Clerk, By R. D. Sterling, Deputy.

Entered June 14, 1955. Book 2921, Page 313. By E. Jenkins, Deputy.

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF LOS ANGELES.

ASPEN PICTURES, INC.,
Plaintiff,
vs.
THE OCEANIC STEAMSHIP COMPANY et al.,
Defendants.
No. 614078.

JUDGMENT ON VERDICT IN OPEN COURT.

This action came on regularly for trial on the 31st day of May, 1955; the plaintiff appearing by attorney Leonard Horwin, and the defendants appearing by attorney Brobeck, Phleger & Harrison, by Samuel L. Holmes.

A jury of 12 persons was regularly impaneled and sworn to try the action. Witnesses on the part of the plaintiff and the defendants were sworn and examined. After hearing the evidence, the arguments of counsel, and instructions of the Court, the jury retired to consider of their verdict, and subsequently returned into Court, and

being called answered to their names and duly rendered their verdict in writing in words and figures as follows, to-wit:

"TITLE OF COURT AND CAUSE." We, the jury in the above entitled action, find for the defendants THE OCEANIC STEAMSHIP COMPANY and MATSON NAVIGATION CO., and against the plaintiff ASPEN PICTURES, INC. This 13 day of June, 1955.

Horace Rucker
Foreman

WHEREFORE, by virtue of the law, and by reason of the premises aforesaid, it is ordered, adjudged, and decreed that said defendants THE OCEANIC STEAMSHIP COMPANY and MATSON NAVIGATION CO., have and recover from said plaintiff, ASPEN PICTURES, INC., costs and disbursements amounting to the sum of $501.11.

JUDGMENT ON VERDICT IN OPEN COURT.

2. Memorandum of trial court on ruling on motion for new trial.

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF LOS ANGELES.

ASPEN PICTURES, INC.,
Plaintiff,
vs.
THE OCEANIC STEAMSHIP COMPANY et al.,
Defendants.
No. 614078.

MEMORANDUM OF RULING ON MOTION FOR A NEW TRIAL.

The court has concluded that the evidence affords adequate support for the findings of fact which necessarily are implied in the verdict of the jury.

Apart from the sufficiency of the evidence, the contention primarily advanced by plaintiff in support of its motion is that the court erroneously instructed the jury that plaintiff was charged with notice of certain of the terms and conditions of the bill of lading.

It is undisputed that the defendant Oceanic filed its tariff (Exhibit "D") with the United States Maritime Commission. This it was required to do by the provisions of the Intercoastal Shipping Act (46 U. S. C. A., sec. 844; see also secs. 845b and 801), and by the Federal regulations promulgated pursuant thereto (Tariff Cir. 3; 13 Fed. Reg. 709; Code of Federal Regulations, Title 46, Part 231). It is clear from the decisions of the Federal courts that shippers are chargeable with constructive notice of the terms and provisions of tariffs and related rules and regulations to the extent, and only to the extent, that the same have been filed pursuant to the requirements of applicable Federal law. As stated in *Pacific S. S. Co.* v. *Cackette*, 8 F. 2d 259:

> "It may be conceded that, by virtue of the reference to a lawfully published tariff, every passenger who travels by means of a ticket such as that which is here involved, is chargeable with notice of everything contained in such published tariff schedules which is by law required to be therein inserted, and that such a provision becomes part of the contract of transportation. *Missouri, K. & T. R. Co.* v. *Harriman*, 227 U. S. 657, 33 S. Ct. 397, 57 L. Ed. 690; *Boston & Maine R. R.* v. *Hooker*, 233 U. S. 97, 113, 34 S. Ct. 526, 529, 58 L. Ed. 868, L. R. A. 1915B, 450, Ann. Cas. 1915D, 593. In the case last cited, the court said: 'It follows therefore, from the previous decisions in this court, that, if it be found that the limitation of liability for baggage is required to be filed in the carrier's tariffs, the plaintiff was bound by such limitation,' and the court made express reference to the notice which follows from the filed and published regulations 'as required by the

statute and the order of the Interstate Commerce Commission.'

* * * * * * *

"* * * The public, in dealing with a common carrier, are bound to take notice that it has filed a tariff of rates and charges, and are chargeable with notice of everything that is properly included in or related to such system of rates and charges. Rates for passenger transportation may be, as the court found in the Hooker Case, directly affected by the degree of the carrier's responsibility for safe carriage and delivery of baggage * * *."

(At pp. 260-261.)

In the light of the foregoing, we must examine the Federal law to determine to what extent the defendant carrier was required to file and publish the rules and regulations which it set forth in its contracts with its shippers, that is to say in its form bill of lading. The Intercoastal Shipping Act (46 U. S. C. A., secs. 844, *et seq.*) applicable in this case by virtue of the provisions of section 845b provides in part as follows:

"Every common carrier by water in intercoastal commerce shall file with the United States Maritime Commission and keep open to public inspection schedules showing all the rates, fares, and charges * * *. The schedules filed and kept open to public inspection as aforesaid by any such carrier * * * shall also state separately * * * any rules or regulations which in anywise change, affect, or determine any part or the aggregate of such aforesaid rates, fares, or charges, or the value of the service rendered to the passenger, consignor, or consignee * * *."

The same section of the Federal statute provides that the Maritime Commission shall by regulations prescribe the form and manner in which the schedules required shall be published, filed and posted.

The regulations as promulgated by the Commission (13 Fed. Reg. 709) restate the requirements with respect to the filing of schedules of rates, fares, and charges, and further require that such schedules "shall state separately each terminal or other charge, privilege, or facility, granted or allowed, and any rules or regulations which in anywise change, affect, or determine any part of the aggregate of such rates, fares, or charges, or the value of the service rendered to the consignor, consignee, or passenger * * *." The regulation defines tariff as "a publication containing actual rates, fares, charges, classifications, rules, regulations, and practices of a common carrier for transportation by water."

The tariff as filed by Oceanic sets forth the entirety of the bill of lading verbatim. Paragraph 2 thereof not only incorporates by reference the provisions of the Carriage of Goods by Sea Act, but further states with respect thereto as follows: "The provisions stated in said Act shall (except as may be otherwise provided herein) govern before the goods are loaded, on and after they are discharged from the ship, and throughout the entire time that they are in the custody of the carrier."

Paragraph 12 of the bill of lading filed as a part of the tariff reads as follows:

> "Carrier does not undertake that the goods shall arrive at port of discharge, destination, or transshipment, at any particular date or time, or to meet any particular market, or in time for any particular use. Scheduled or advertised sailing and arrival times are only expected times and may be advanced or delayed if carrier shall find it necessary, prudent or convenient to do so."

Among the incorporated provisions of the Carriage of Goods by Sea Act are the following:

"Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from —* * * (j) Strikes or lockouts or stoppage or restraint of labor from whatever cause, whether partial or general: *Provided*, That nothing herein contained shall be construed to relieve a carrier from responsibility for the carrier's own acts; * * *."

It is the conclusion of the court that the regulation purporting to immunize the carrier from liabiilty for loss or damage resulting from strikes or stoppage or restraint of labor is of such a character that it was required to be included as a part of published tariff and that accordingly the public is chargeable with notice of its existence and effect.

The regulations dealt with in *Pacific S. S. Co.* v. *Cackette*, 8 F. 2d 259, and in *Bernard* v. *U. S. Aircoach*, 117 Fed. Supp. 134, were of a procedural rather than a *substantive* character. Purporting only to require the filing of a notice of claim of loss, they had "no perceptible relation to rates and charges for transportation." In contrast, the regulation here involved, designed as it is to exonerate the carrier from liability for loss due to specified causes is *substantive*.

It seems clear that freight rates may be affected by the degree of the carrier's responsibility for the goods shipped. It is equally clear that any limitation upon such responsibility has a bearing upon "the value of the services rendered" by the carrier.

For the foregoing reasons, we conclude that there was no error in the instructions which advised the jury that plaintiff was chargeable with notice of the substantive regulations which were a part of the carrier's published tariff. The jury was told in clear and definite terms that this general rule of immunity from liability for loss or damage resulting from strikes or restraints of labor was

limited and qualified. The key instruction on this aspect of the case was as follows:

> "By the terms of the bill of lading involved in this case and by the terms of a federal statute called the Carriage of Goods by Sea Act, it is provided that neither the carrier nor the ship shall be responsible for loss or damage arising from or resulting from strikes or lockouts or restraints of labor. This means that the common carrier is granted a general immunity from liability for any loss or damage suffered by a shipper which results from strikes or restraints of labor.
>
> "This general rule of immunity, however, is subject to the limitation or qualification which I shall now state to you.
>
> "The common carrier owes to the shipper the duty to exercise ordinary care in the handling of the shipper's property so as to avoid causing the shipper loss or damage, and the duty also to inform the shipper of any fact or facts which are known to the carrier but unknown to the shipper and which a person of ordinary prudence in the carrier's position would recognize as being likely to cause a substantial delay or detention of the shipper's goods beyond the usual time in transit. The reason for imposing the latter duty upon the carrier is to afford the shipper in such circumstances the opportunity to exercise his own judgment as to whether to make the shipment or to make other arrangements.
>
> "The standard of care required of the carrier in the performance of these duties is that of ordinary or reasonable care. Neither the terms of the bill of lading nor the terms of any federal law operates to relieve a carrier of liability to a shipper for damage proximately caused by a breach of either of the duties which I have just defined. If you find that the defendant carrier in this case was negligent in respect

to the performance of its duty to plaintiff, as I have defined that duty, and if such negligence was the proximate cause of damage to plaintiff, then plaintiff is entitled to recover."

We believe that the foregoing instruction correctly states the law as applicable to this case.

After further consideration, we adhere to the opinion that the jury was correctly instructed as to the burden of proof upon the issue of negligence

Finally, we are of the opinion that the alleged misconduct on the part of the witness Carter was not of such a character that it could reasonably be deemed to have had any effect upon the verdict of the jury.

Motion for a new trial is therefore denied.

Dated this 15th day of August, 1955.

Roy L. Herndon,
Judge.

3. Opinion of California District Court of Appeals, Second Appellate District.

[Civ. No. 21643. Second Dist., Div. One. Feb. 4, 1957.]

Aspen Pictures, Inc., Appellant, v. The Oceanic Steamship Company *et al.*, Respondents.

Appeal from a judgment of the Superior Court of Los Angeles County. Roy L. Herndon, Judge. Affirmed.

Action by a shipper of goods against a carrier for damages resulting from delay in carriage of goods. Judgment for defendants affirmed.

Leonard Horwin and Richard I. M. Kelton for Appellant.

Brobeck, Phleger & Harrison and Sheppard, Mullin, Richter & Balthis for Respondents.

Fourt, J.—This is an appeal by the plaintiff from a judgment on a verdict rendered in favor of defendant in an action by the shipper of goods against the carrier for damages resulting from a delay in the carriage of plaintiff's goods.

Plaintiff delivered to defendants, who are common carriers, certain motion picture equipment and supplies for shipment to Samoa on defendants' steamship "Sierra," which was scheduled to depart from the port of Los Angeles on May 24, 1952, and to arrive in Samoa at the end of the first week in June. The material was needed by plaintiff in connection with its production of a motion picture in Samoa, commencing in mid-June. Plaintiff's executive producer, together with a part of the cast and crew, departed by air for Samoa on May 22, 1952. The goods were loaded on board the Sierra on May 24, 25 and 26. A seamen's strike delayed the sailing of the vessel, with the result that plaintiff was delayed approximately six weeks in commencing production of its motion picture.

For some time prior to the time plaintiff's goods were loaded on board the Sierra, the Sailors Union of the Pacific and the Pacific Maritime Association, defendants' bargaining agent, had been negotiating a new collective bargaining contract. On May 23, 1952, the union adopted a resolution, which was communicated to defendants, that effective immediately the men would refuse to sail any of defendants' vessels except those certified by the United States Military Transport Service to be carrying military cargo to Korea, and that a strike vote would be taken on May 26, unless an agreement with defendants' collective bargaining agent were reached by that time. Also on May 23, 1952, the Union's representatives informed defendant's rep-

resentatives that none of their ships would be permitted to sail for an indefinite period. No agreement was reached between the Union and the defendants' bargaining agent and accordingly, a coast-wide strike vote was taken and carried on May 26, picket lines were established the following day and maintained thereafter, and no cargo could be removed from defendants' vessels without the consent of the union. No notice was given by defendants to plaintiff regarding the labor dispute, the work stoppage or the threatened strike until May 28, when defendants notified plaintiff that the ship was delayed by reason of the strike.

It is plaintiff's contention that knowing the importance to the shipper of timely delivery of the cargo, defendants were negligent in failing to notify plaintiff of the likelihood of a work stoppage and in failing to take initiative on their own to stop the loading of the cargo onto a ship that was already under work stoppage and threatened with imminent strike.

Defendants contend that the terms and conditions of the contract of carriage are set forth in the bills of lading and that plaintiff is bound by the terms thereof; that the Carriage of Goods by Sea Act (hereinafter referred to as COGSA) is specifically incorporated in the bills of lading and that under the provisions of section 4(2) (j) of that act[1] defendants are exempt from liability.

---

[1]Section 4(2)(j) of the Carriage of Goods by Sea Act (U. S. Code, title 46, Section 1304; 49 Stats. 1210) reads as follows:

"(2) Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from—

* * * * * * *

"(j) Strikes or lockouts or stoppage or restraint of labor from whatever cause, whether partial or general: *Provided*, That nothing herein contained shall be construed to relieve a carrier from responsibility for the carrier's own acts;"

The dock receipts for plaintiff's goods were prepared by Barnett International Forwarders, Inc., on behalf of plaintiff, for execution by defendants at the time of receipt of the goods. The receipts contain the following language printed thereon: "THE GOODS ABOVE SPECIFIED WERE RECEIVED UPON THE UNDERSTANDING, AND SHIPPER BY ACCEPTING DUPLICATE DOCK RECEIPT AGREES, that except as otherwise provided herein the custody and carriage of said goods by the Oceanic Steamship Company shall be GOVERNED BY THE CONTRACTUAL TERMS AND CONDITIONS OF THAT COMPANY'S REGULAR FORM OF BILL OF LADING, before as well as after its issuance * * *. During any time that the goods are in the custody of the Company prior to loading, the Company shall hold them as warehousemen only and in the event of loss or damage during such time shall not be subject to the burden of proof prescribed by Section 4(2) (Q) of the Carriage of Goods by Sea Act."

After the goods were loaded on board the Sierra, and in exchange for the dock receipts, Oceanic Steamship Company issued its bills of lading which provided, in pertinent part, as follows: "* * * THE SHIPPER BY RECEIVING THIS CONTRACT BILL OF LADING AGREES that the custody and carriage of the goods are subject to the terms and conditions provided herein and the authorities and liberties granted hereby, AS SET FORTH ON THIS AND ON THE REVERSE SIDE HEREOF, whether written, stamped or printed, which shall govern the relations, whatsoever they may be, between the Shipper, Consignee and Cargo Owner and the Carrier, Master and Vessel and every contingency, wheresoever and whensoever occurring." The reverse side of the bills of lading contain the following provisions, among others:

"2. This bill of lading shall be deemed to incorporate and shall have effect subject to the provisions of the Car-

riage of Goods by Sea Act of the United States, approved April 16, 1936, and nothing herein contained shall be deemed a surrender by Carrier of any of its rights or immunities or an increase of any of its responsibilities or liabilities thereunder; nor shall Carrier be deemed to have warranted the seaworthiness of the Vessel. The provision stated in said Act shall (except as may be otherwise provided herein) govern before the Goods are loaded on and after they are discharged from the ship and throughout the entire time that they are in the custody of the Carrier. In respect of goods carried on deck and stated herein to be so carried, all risks of loss or damage by perils incident to such carriage shall be borne by Cargo Owner but in all other respects the custody and carriage of such goods shall be governed by the terms of this bill of lading and the provisions stated in said Carriage of Goods by Sea Act notwithstanding Section 1(c) thereof. Carrier shall also have the benefit of Sections 181 to 189, inclusive, of Title 46, U. S. Code, and of all other statutes of the United States or any other country which may be applicable in the circumstances to grant Carrier exemption from or limitation of liability.

* * * * * *

"12. Carrier does not undertake that the Goods shall arrive at port of discharge, destination or transshipment at any particular date or time or to meet any particular market or in time for any particular use. Scheduled or advertised sailing and arrival times are only expected times and may be advanced or delayed if Carrier shall find it necessary, prudent or convenient to do so."

Pursuant to the provisions of the Intercoastal Shipping Act (46 U. S. C. A., §§ 843-848) and the regulations promulgated thereunder defendant Oceanic Steamship Company, hereinafter referred to as Oceanic filed with

the United States Maritime Commission its tariff, in which a copy of Oceanic's bill of lading is set forth in full.

Plaintiff urges as grounds for reversal that there was prejudicial error in the giving of certain instructions and in the admission of evidence.

Plaintiff contends that the following instruction was erroneous:

"The Oceanic Steamship Company is a common carrier under the laws of the United States. As a common carrier it is required by law to treat all customers alike. For that purpose it was required to file with the Federal Maritime Board a freight tariff setting forth rates and the bill of lading containing terms and conditions under which it will carry goods of any shipper. The filing of such a tariff is regarded in the law as a public notice to all customers or shippers of all of the terms and conditions under which the company may carry the goods of any shipper. It is prohibited by law from varying from the published tariff, for to do so would result in a discrimination between shippers. Therefore the plaintiff is presumed to have notice of the tariff, as filed, and the terms and conditions set forth therein.

"The bill of lading is the form of contract under which goods could be carried by the steamship company. If the form of the bill of lading issued by the Oceanic Steamship Company was published in full in its freight tariff, the plaintiff is presumed to have known all of its terms and conditions. Therefore, the plaintiff is presumed to have known that the defendants could not legally guarantee to carry the plaintiff's goods to its destination at a particular date or time or in time for any particular use.

"These presumptions of knowledge or notice on the part of plaintiff are conclusive and you may not find that

plaintiff did not have such knowledge or notice, if you find that the form of bill of lading was filed as part of the defendant's tariff."

Plaintiff argues that (1) the terms and conditions of the bill of lading were not binding upon the shipper merely because they had been filed with the Federal Maritime Board as a part of the carrier's tariff and (2) even if it be determined that plaintiff was bound by the terms of the bill of lading which the law required the carrier to file with the Federal Maritime Board, plaintiff was not bound by the exemption clauses contained in the bill of lading since they are not a part of the tariff, citing *Pacific S. S. Co.* v. *Cackette*, 8 F. 2d 259, and *Bernard* v. *U. S. Aircoach*, 117 F. Supp. 134.

There was no error in the foregoing instruction. The same contention was advanced by plaintiff in its motion for a new trial and the trial court in its memorandum of ruling on that motion correctly stated the law as follows:

"It is undisputed that the defendant Oceanic filed its tariff (Exhibit 'D') with the United States Maritime Commission. This it was required to do by the provisions of the Intercoastal Shipping Act (46 U. S. C. A., § 844; see also §§ 845b and 801), and by the federal regulations promulgated pursuant thereto (Tariff Cir. 3; 13 Fed. Reg. 709; Code of Federal Regulations, title 46, part 231). It is clear from the decisions of the federal courts that shippers are chargeable with constructive notice of the terms and provisions of tariffs and related rules and regulations to the extent, and only to the extent, that the same have been filed pursuant to the requirements of applicable federal law. As stated in *Pacific S. S. Co.* v. *Cackette*, 8 F. 2d 259:

" 'It may be conceded that, by virtue of the reference to a lawfully published tariff, every passenger who travels

by means of a ticket such as that which is here involved, is chargeable with notice of everything contained in such published tariff schedules which is by law required to be therein inserted, and that such a provision becomes part of the contract of transportation. *Missouri, K. & T. R. Co.* v. *Harriman*, 227 U. S. 657 [33 S. Ct. 397, 57 L. Ed. 690]; *Boston & Maine R. R.* v. *Hooker*, 233 U. S. 97, 113 [34 S. Ct. 526, 529, 58 L. Ed. 868, L. R. A. 1915B 450, Ann. Cas. 1915D 593]. In the case last cited, the court said: "It follows therefore, from the previous decisions in this court, that, if it be found that the limitation of liability for baggage is required to be filed in the carrier's tariffs, the plaintiff was bound by such limitation," and the court made express reference to the notice which follows from the filed and published regulations "as required by the statute and the order of the Interstate Commerce Commission."

* * * * * * *

"'* * * The public, in dealing with a common carrier, are bound to take notice that it has filed a tariff of rates and charges, and are chargeable with notice of everything that is properly included in or related to such system of rates and charges. Rates for passenger transportation may be, as the court found in the Hooker Case, directly affected by the degree of the carrier's responsibility for safe carriage and delivery of baggage * * *.' (At pp. 260-261).

"In the light of the foregoing, we must examine the Federal law to determine to what extent the defendant carrier was required to file and publish the rules and regulations which it set forth in its contracts with its shippers, that is to say in its form bill of lading. The Intercoastal Shipping Act (46 U. S. C. A., §§844 *et seq.*) applicable in this case by virtue of the provisions of section 845b provides in part as follows:

"'Every common carrier by water in intercoastal commerce shall file with the United States Maritime Commission and keep open to public inspection schedules showing all the rates, fares, and charges * * *. The schedules filed and kept open to public inspection as aforesaid by any such carrier * * * shall also state separately * * * any rules or regulations which in anywise change, affect, or determine any part or the aggregate of such aforesaid rates, fares, or charges, or the value of the service rendered to the passenger, consignor, or consignee * * *.'

"The same section of the federal statute provides that the Maritime Commission shall by regulation prescribe the form and manner in which the schedule required shall be published, filed and posted.

"The regulations as promulgated by the commission (13 Fed. Reg. 709) restate the requirements with respect to the filing of schedules of rates, fares, and charges, and further require that such schedules 'shall state separately each terminal or other charge, privilege, or facility, granted or allowed, and any rules or regulations which in anywise change, affect, or determine any part of the aggregate of such rates, fares, or charges, or the value of the service rendered to the consignor, consignee, or passenger * * *.' The regulation defines tariff as 'a publication containing actual rates, fares, charges, classifications, rules, regulations, and practices of a common carrier for transportation by water.'

"The tariff as filed by Oceanic sets forth the entirety of the bill of lading verbatim. Paragraph 2 thereof not only incorporates by reference the provisions of the Carriage of Goods by Sea Act, but further states with respect thereto as follows: 'The provisions stated in said Act shall (except as may be otherwise provided herein) govern

before the goods are loaded, on and after they are discharged from the ship, and throughout the entire time that they are in the custody of the carrier.'

"Paragraph 12 of the bill of lading filed as a part of the tariff reads as follows:

" 'Carrier does not undertake that the goods shall arrive at port of discharge, destination, or transshipment, at any particular date or time, or to meet any particular market, or in time for any particular use. Scheduled or advertised sailing and arrival times are only expected times and may be advanced or delayed if carrier shall find it necessary, prudent or convenient to do so.'

"Among the incorporated provisions of the Carriage of Goods by Sea Act are the following:

" 'Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from—* * * (j) Strikes or lockouts or stoppage or restraint of labor from whatever cause, whether partial or general: *Provided,* That nothing herein contained shall be construed to relieve a carrier from responsibility for the carrier's own acts; * * *.'

"It is the conclusion of the court that the regulation purporting to immunize the carrier from liability for loss or damage resulting from strikes or stoppage or restraint of labor is of such a character that it was required to be included as a part of published tariff and that accordingly the public is chargeable with notice of its existence and effect.

"The regulations dealt with in *Pacific S. S. Co.* v. *Cackette,* 8 F. 2d 259, and in *Bernard* v. *U. S. Aircoach,* 117 F. Supp. 134, were of a procedural rather than a *substantive* character, purporting only to require the filing

of a notice of claim of loss, they had 'no perceptible relation to rates and charges for transportation.' In contrast, the regulation here involved, designed as it is to exonerate the carrier from liability for loss due to specified causes is *substantive*.

"It seems clear that freight rates may be affected by the degree of the carrier's responsibility for the goods shipped. It is equally clear that any limitation upon such responsibility has a bearing upon 'the value of the services rendered' by the carrier."

Plaintiff also asserts that it was prejudicial error for the court to give the following instructions:

(a) "By the terms of the bill of lading involved in this case and by the terms of a federal statute called the Carriage of Goods by Sea Act, it is provided that neither the carrier nor the ship shall be responsible for loss or damage arising from or resulting from strikes or lockouts or restraints of labor. This means that the common carrier is granted a general immunity from liability for any loss or damage suffered by a shipper which results from strikes or restraints of labor.[2]

---

[2]Plaintiff has quoted only a portion of this instruction, the balance of which reads as follows:

"This general rule of immunity, however, is subject to the limitation or qualification which I shall now state to you.

"The common carrier owes to the shipper the duty to exercise ordinary care in the handling of the shipper's property so as to avoid causing the shipper loss or damage, and the duty also to inform the shipper of any fact or facts which are known to the carrier but unknown to the shipper and which a person of ordinary prudence in the carrier's position would recognize as being likely to cause a substantial delay or detention of the shipper's goods beyond the usual time in transit. The reason for imposing the latter duty upon the carrier is to afford the shipper in such circumstances the opportunity to exercise his own judgment as to whether to make the shipment or to make other arrangements.

(b) "A shipping company does not insure that cargo will be delivered according to schedule and is not automatically liable as an insurer in case of delays in shipment."

(c) "As to the issues of negligence, plaintiff has the burden of proof; that is to say, the burden is upon the plaintiff to prove negligence on the part of the defendants by a preponderance of the evidence."[3]

It is plaintiff's contention that (1) the applicable statute is the Harter Act (46 U. S. C., §190) and not COGSA, and (2) the foregoing instructions erroneously put the burden upon plaintiff to prove negligence whereas the burden was upon defendants to prove that the strike was the cause of the damage and that they were not negligent in failing to give the shipper notice of the likelihood of delay.

"The standard of care required of the carrier in the performance of these duties is that of ordinary or reasonable care. Neither the terms of the bill of lading nor the terms of any federal law operates to relieve a carrier of liability to a shipper for damage proximately caused by a breach of either of the duties which I have just defined. If you find that the defendant carrier in this case was negligent in respect to the performance of its duty to plaintiff, as I have defined that duty, and if such negligence was the proximate cause of damage to plaintiff, then plaintiff is entitled to recover."

[3]The balance of this instruction, which precedes the part quoted by plaintiff, reads as follows:

"Negligence is the doing of some act which a reasonably prudent person would not do, or the failure to do something which a reasonably prudent person would do, actuated by those considerations which ordinarily regulate the conduct of human affairs. It is the failure to use ordinary care in the management of one's property or person."

There is no merit in these contentions. With reference to the contention that the Harter Act is the applicable statute, that act is superseded by COGSA in domestic commerce at the option of the carrier when the bill of lading contains an express statement that it shall be subject to the Carriage of Goods by Sea Act (46 U. S. C. A., §1312). In the instant case, the dock receipts specifically provide that the custody and carriage of the goods shall be governed by the contractual terms and conditions of Oceanic's regular bill of lading, and the bills of lading expressly incorporate the provisions of COGSA. Moreover, the Sierra did not leave the port of Los Angeles, and the Harter Act does not apply in any event until the vessel "breaks ground" to start her voyage (*The Newport*, 7 F. 2d 452; Knauth, Ocean Bills of Lading, fourth ed. (1953), p. 166). Plaintiff's goods were discharged and returned to it before the voyage was commenced.

With respect to the instruction as to the burden of proof, plaintiff alleged in its complaint that it caused its goods to be delivered to defendants at their dock on May 19, 20 and 24, 1952; that the seamen represented by the Sailors Union of the Pacific went on strike at about 9 p. m. on May 26, 1952, against the SS Sierra, and others; that on May 28, 1952, plaintiff was advised by defendants that the Sierra was delayed by a maritime strike and had not sailed; that following said advice and notice, plaintiff made strenuous efforts through the Government of American Samoa, and other authorities, to cause the Sailors Union of the Pacific to permit the "SIERRA" to sail, but without avail; that on or about June 26, 1952, having obtained permission from the Sailors Union of the Pacific to remove its goods from the Sierra, plaintiff transferred them to another vessel. These allegations were admitted by defendants.

It was undisputed, therefore, that the delay in the sailing of the Sierra was caused by the strike. Under the express provisions of the bills of lading and COGSA, defendants were exempt from liability for damages caused by such delay unless plaintiff proved that defendants' negligence contributed to the damage (*The Mangalia*, 69 F. Supp. 688, 693; *American Tobacco Co.* v. *The Katingo Hadjipatera*, 194 F. 2d 449, 450; *The Maui*, 113 F. 2d 1018, 1020). As stated in *George F. Pettinos, Inc.*, v. *American Export Lines*, 68 F. Supp. 759, 761: "Section 4 of the Carriage of Goods by Sea Act establishes sixteen exceptions from liability. If the loss is caused by one of the enumerated exceptions, the carrier will not be held liable unless it appears that its negligence contributed to the damages, and the burden of proof upon that issue is upon the libellant."

Plaintiff argues strongly that defendants had the duty of notifying the shipper of the likelihood of a strike. In its brief plaintiff asserts that "in the instant case there was a factual conflict about the need for notice." By their verdict the jury impliedly found that defendants were not negligent in failing to give notice or in loading plaintiff's goods aboard ship. Plaintiff has failed to show that there is no substantial evidence to sustain the implied findings of the jury.

Plaintiff maintains the following instructions erroneously relieved the carrier from the unlawful acts of its servants and created a presumption in favor of the carrier that its employees would obey the carrier's orders and sail the ship:

(a) "Seamen who have signed written shipping articles for a voyage work under different conditions from workers on shore and are governed by different rules. The

laws of the United States require seamen to sign articles promising, during the voyage, obedience to all lawful commands. When articles are signed by a crew for a voyage, all bargaining, individuals or collective, is ended for the duration of the voyage. After such articles are signed there exists no right to strike. A strike by seamen under such circumstances is in violation of law. Sailors who have signed lawful articles and have undertaken a voyage have no right to strike or to refuse to sail the ship."

(b) "For sailors to breach shipping articles by engaging in a strike or work stoppage and refusing to sail a vessel would be an unlawful act. The Criminal Code of the United States provides that whoever, being a member of the crew on a vessel of the United States on any waters within the admiralty jurisdiction of the United States (and that includes Los Angeles Harbor), resists or prevents a master of a ship in the free and lawful exercise of his authority in command of the ship is guilty of a revolt and a mutiny. Whoever, being a member of the crew of such a vessel, endeavors to make a revolt or mutiny or combines, conspires or confederates with any other person on board the ship to make such a revolt or mutiny, or solicits, incites or stirs up any other of the crew to disobey or resist the lawful orders of the master or other officer of the ship or refuse or neglect their proper duties on board the ship is guilty of the crime of inciting revolt or mutiny."

(c) "The abandonment of duty by a seaman, after signing articles, by quitting the ship before the termination of his engagement, without justification and with the intention of not returning, is desertion, for which a seaman may be punished under statutes of the United States."

(d) "There is a presumption that the ordinary course of business will be followed and that the law will be obeyed."

We cannot agree with plaintiff's construction of these instructions. Plaintiff has quoted only a part of the foregoing instruction (d), the balance of which reads as follows: "However, it is for the jury to decide, in the light of all the facts and circumstances shown by the evidence, whether the defendants had knowledge of such facts that in the exercise of ordinary care they should have foreseen that a substantial delay in the sailing of the Sierra was probable." The court then gave the following instruction: "If, in spite of the facts that the seamen on the Sierra were under shipping articles, the defendants had knowledge of such other facts that in the exercise of ordinary care they should have foreseen the probability of a strike or work stoppage which would be likely to cause a substantial delay or detention of plaintiff's property, defendants were under a duty to take such actions with reference to plaintiff and plaintiff's property as a person of ordinary prudence would be expected to take under the same circumstances."

As stated in *Perbost* v. *San Marino Hall-School*, 88 Cal. App. 2d 796, at page 801 [199 P. 2d 701]: "The virtue of one instruction cannot be determined by extracting it from the context of the entire charge to be criticized as if it alone were given. * * * The correctness of all the instructions given in a cause can be determined only by such reasonable construction as will enable a judge to ascertain their probable effect upon the jury in the light of the issues raised by the pleadings (*Guay* v. *American President Lines*, 81 Cal. App. 2d 495, 513 [184 P. 2d 539]).

"* * * In considering an instruction assigned as prejudicial the reviewing court must adopt such construction

thereof as will support the judgment rather than one that will defeat it, if the one adopted is susceptible of such interpretation (*Mullanix* v. *Basich*, 67 Cal. App. 2d 675, 681 [155 P. 2d 130]). Considering the instructions in the light of the foregoing rules, it appears obvious that the instructions were directed to the issue of whether defendants were negligent in failing to notify plaintiff of the work stoppage and threatened strike.

Plaintiff also asserts that the court erred in its instructions on agency, and particularly in instructing the jury that Barnett International Forwarders, Inc., was plaintiff's agent for certain limited purposes. We find no error in the instructions complained of. There is evidence that plaintiff hired Barnett to prepare export declarations, obtain export licenses and to handle the documentation of the goods through customs. Mr. Santiestevan, the secretary of Barnett, testified that he prepared the export declarations and dock receipts; that his company paid the Federal Transfer Company for delivering plaintiff's goods to the dock, and was reimbursed by plaintiff; that Barnett also paid an invoice from defendant Matson Navigation Company for freight charges on plaintiff's shipment, and received the bills of lading and copies of the export declarations from the Matson Company. The jury was properly instructed that "The burden of proving an agency, as well as the scope of the agent's authority, rests upon the party who asserts the existence thereof and who seeks thereby to charge the principal with the knowledge, acts or omissions of the agent."

Plaintiff complains of the following instruction: "You are instructed that though a person may not have actual knowledge of certain facts, but if he has knowledge of sufficient facts to cause a reasonably prudent person of ordinary intelligence to make inquiry, the law will impute

knowledge of those facts which may be easily ascertained by reasonable inquiry. When the law imputes knowledge, it has the same legal effect as though there was actual knowledge."

Plaintiff does not claim that the instruction was an incorrect statement of the law but maintains that it was prejudicial error for the court to admit into evidence issues of the Los Angeles Times of May 24 and May 25, 1952, containing on the front pages thereof accounts of the work stoppage and impending strike and that this instruction together with such evidence was sufficient to permit the jury to infer erroneously that plaintiff had knowledge of the strike and therefore defendants had no obligation to give actual notice.

In our opinion the admission into evidence of the newspapers, if error, was not prejudicial and the instruction, when considered with other instructions given, would not have misled the jury. The jury was fully instructed as to the duty of a carrier to inform the shipper of any fact or facts which are known to the carrier but unknown to the shipper and which a person of ordinary prudence in the carrier's position would recognize as being likely to cause a substantial delay (See footnote, p. 14).

Instructions are to be read and considered as a whole and so considered, "if it appears therefrom that the jury were fairly and fully instructed on all the law applicable to the facts in the case, the judgment will not be reversed simply because the particular instruction, taken alone, may not have embodied all the law applicable." (*Anderson* v. *Seropian*, 147 Cal. 201, 217 [81 Pac. 521]).

As stated in *Henderson* v. *Los Angeles Traction Co.*, 150 Cal. 689, at page 699 [89 Pac. 976]: "Where numerous

instructions are given (as in this case it may well be that some particular instruction fails to contain a complete or accurate statement of the law. If however, when the entire charge is examined the omissions or inaccuracies in a particular instruction appear to have been supplied, and the jury fairly and consistently instructed, generally, as to the law, this is sufficient to defeat any claim of error predicated on defects in particular instructions."

Whether errors in instructions were prejudicial must depend upon the closeness of the case on its facts, nature of the erroneous instructions and of other instructions given and other factors (*Pullen* v. *Heyman Bros.*, 71 Cal. App. 2d 444, 453 [162 P. 2d 961]). Also, unless, upon a consideration of the entire case, including the evidence it appears that the error complained of has resulted in a miscarriage of justice, judgment will not be reversed by reason of an erroneous instruction (*Perbost* v. *San Marino Hall-School, supra*, 88 Cal. App. 2d 796, 801; *Radisich* v. *Franco-Italian Packing Co.*, 68 Cal. App. 2d 825, 843 [158 P. 2d 435]). In our opinion, considering the instructions as a whole, the jury was fairly and fully instructed and there was no prejudicial error.

Plaintiff contends that the court erred in (a) admitting evidence of a claimed custom of seamen not to strike when they had signed foreign articles, and refusing to allow cross-examination of the witnesses regarding this testimony, and (b) admitting evidence of a custom of not insuring or guaranteeing the arrival or departure of a vessel.

On direct examination one of defendants' witnesses was asked the following question: "Now, in your experience, 20 years in the shipping business, Mr. Hudson, have you ever known of a vessel upon which the sailors, that is, the unlicensed deck department, had signed foreign articles

and undertaken a voyage where they then subsequently went on strike and refused to sail the ship?" Plaintiff's objection, upon the ground that it did not tend to prove or disprove any issue in the case was overruled, and the witness replied that he did not recall any such incident. A similar question was asked of three other witnesses, with the same reply. One of the issues was whether defendants were negligent in failing to notify plaintiff of the likelihood of a strike and the evidence related to whether defendants could reasonably rely on the probable fulfillment of the obligation of the sailors under their articles. The trial court's ruling was correct.

Plaintiff was not denied its right of cross-examination of these witnesses. The trial court properly assigned defendants' objection to plaintiff's question as to any instances where sailors after having signed foreign articles were prevented from striking by reason of having signed such articles. The question clearly called for the witnesses' conclusion.

Plaintiff's contention that the trial court, over its objection, erroneously admitted evidence, of a custom of not insuring or guaranteeing the arrival or departure of a vessel is also without merit. Plaintiff's witness Mr. Warth testified that Mr. Carter, defendants' freight agent, assured him the *Sierra* would sail on the 24th. The trial court sustained plaintiff's objection to the following question asked of Mr. Carter: "Is there any custom or practice in the shipping industry with respect assuring or guaranteeing departure or arrivals of vessels?" The witness was then asked; "Mr. Carter, do you recall of any instance in your experience in the shipping business when *you* assured or guaranteed either an arrival or departure date of a vessel?" (Emphasis added.) The witness replied: "I recall no instance in my experience in the

shipping game where I have ever guaranteed a sailing or guaranteed arrival. That is basic in this business. It's the thing that you cut your eye teeth on in the shipping game, and I did not give such an assurance, such a guarantee." The witness further testified that he did not assure or guarantee to Mr. Theron Warth or any other representative of plaintiff in any conversation that the SS Sierra would sail on a certain date or would arrive in Samoa on a certain date. There was no error in the court's ruling.

Finally, plaintiff contends the trial court's denial of a new trial for defendants' wrongful interference with the jury was erroneous. Plaintiff, on its motion for new trial, submitted an affidavit of one of the jurors that during a recess, while standing with another juror at the drinking fountain, Mr. Paul N. Carter, district freight agent for defendant Matson Navigation Company, caught their attention, smiled, shrugged his shoulders, and said: "Now you see what we have to cope with." We agree with the ruling of the trial judge that the alleged misconduct on the part of the witness Carter was not of such a character that it could reasonably be deemed to have had any effect upon the verdict of the jury.

The judgment is affirmed.

WHITE, P. J., and DORAN, J., concurred.

APPENDIX C.

Pertinent Portions of the Record.

1. Defendant's first affirmative defense.

Defendant Oceanic undertook and legally could undertake to carry certain equipment of plaintiff from the port of Los Angeles to the port of Pago Pago, Samoa, on its vessel the SIERRA, on Voyage 18 of said vessel, only in accordance with the terms and conditions of the regular forms of bills of lading issued by said defendant to or for the benefit of said plaintiff, a true copy of one of which said bills of lading is annexed hereto, marked Exhibit "A" and by this reference made a part hereof; the other bills of lading issued in connection with such shipment are identical with said Exhibit "A" except for certain of the information set forth in the blanks on the front of each of said bills of lading; said bills of lading provided, among other things, that they were subject to the Carriage of Goods by Sea Act (46 U. S. C. 1300-1315) which said Act provides, among other things, that a carrier shall not be liable for any damage arising or resulting from strikes or stoppage or restraint of labor from whatever cause; as alleged in said second amended complaint, the Sailors Union of the Pacific voted to strike on the evening of May 26, 1952, after the plaintiff's equipment had been loaded on board said vessel, these defendants were unable to sail said vessel from Los Angeles, by reason of the sailors remaining on strike, until on or about July 28, 1952; accordingly, by reason of the terms of the bills of lading and of the Carriage of Goods by Sea Act as applicable to and as incorporated in said bills of lading, neither of these defendants is or are liable to plaintiff for

the damage, if any, which it might have sustained by reason of the delay in the sailing of said vessel or its arrival in Samoa (Clerk's Tr. pp. 21-22).

2. Jury instructions given regarding bill of lading.

The Oceanic Steamship Company is a common carrier under the laws of the United States. As a common carrier it is required by law to treat all customers alike. For that purpose it was required to file with the Federal Maritime Board a freight tariff setting forth rates and the bill of lading containing terms and conditions under which it will carry goods of any shipper. The filing of such a tariff is regarded in the law as a public notice to all customers or shippers of all of the terms and conditions under which the company may carry the goods of any shipper. It is prohibited by law from varying from the published tariff, for to do so would result in a discrimination between shippers. Therefore the plaintiff is presumed to have notice of the tariff, as filed, and the terms and conditions set forth therein.

The bill of lading is the form of contract under which goods could be carried by the steamship company. If the form of the bill of lading issued by the Oceanic Steamship Company was published in full in its freight tariff, the plaintiff is presumed to have known all of its terms and conditions. Therefore, the plaintiff is presumed to have known that the defendants could not legally guarantee to carry the plaintiff's goods to its destination at a particular date or time or in time for any particular use.

These presumptions of knowledge or notice on the part of plaintiff are conclusive and you may not find that plaintiff did not have such knowledge or notice, if you find that the form of bill of lading was filed as part of

the defendants' tariff (Rep. Tr. p. 994, line 1 to p. 995, line 2).

By the terms of the bill of lading involved in this case and by the terms of a federal statute called the Carriage of Goods by Sea Act, it is provided that neither the carrier nor the ship shall be responsible for loss or damage arising from or resulting from strikes or lockouts or restraints of labor. This means that the common carrier is granted a general immunity from liability for any loss or damage suffered by a shipper which results from strikes or restraints of labor (Rep. Tr. p. 997, lines 12-20).

3. Jury instructions refused regarding bill of lading.

In connection with Matson's defense that it is relieved of liability to Aspen by reason of a contract with Aspen contained in the Bill of Lading, you are instructed that:

The burden of proving the existence of such a contract rests upon Matson. In order to prove such a contract it is essential that Matson prove that Aspen consented to the contract. In order for Matson to prove that Aspen consented to the terms of such a contract, Matson must prove that Aspen accepted the terms of the contract, and that the acceptance was absolute and unqualified (Rep. Tr. p. 1014, lines 17-26).

You are further instructed that even if Matson obtained the consent of Aspen to the contract, nevertheless, if that consent was obtained by fraud or misrepresentation, that consent is not real and free and is not effective to constitute a contract. You may find that Matson obtained the consent of Aspen by fraud or misrepresentation if you find that Aspen has shown each of the following elements: First, that Matson intended to induce Aspen to rely on Matson's misrepresentation by entering into

the contract; second, that Matson suggested as a fact or knowingly permitted Aspen to believe as a fact what was not true in fact, or that Matson made the promise to carry the goods of Aspen to Samoa to arrive approximately June 8, 1952, while knowing, or having reason to know, that it could not perform this promise, or concealed the fact of probable delay knowing that delay was probable; third that Aspen accepted the contract in reliance upon the misrepresentation by Matson or upon Matson's aforesaid promise (Rep. Tr. p. 1015, lines 4-21).

Even if you fail to find that Matson's conduct was fraudulent, as determined by the preceding instructions, nevertheless, if you find that Matson issued the Bill of Lading, and that the consent of Aspen to the Bill of Lading was obtained after Matson had been guilty of any of the wrongful conduct on which you have been previously instructed—whether by negligent loading of the goods on a strike-bound ship or failure to give notice as required by law—then you are to disregard the provisions in the Bill of Lading purporting to create contractual obligations and to consider the Bill of Lading as nothing more than a receipt for the goods delivered on board the Sierra on behalf of Aspen (Rep. Tr. p. 1019, lines 2-14).

4. Topic headings in petitioner's briefs to California District Court of Appeal asserting federal question regarding effect of filing a tariff with Federal Maritime Board.

"I. THE TRIAL COURT COMMITTED PREJUDICIAL ERROR IN INSTRUCTING THE JURY THAT PLAINTIFF WAS CONCLUSIVELY BOUND BY THE TERMS OF THE BILL OF LADING PROVING VARIOUS EXEMPTIONS FOR THE CARRIER.

"A. The Trial Court erred in Instructing that the terms and conditions of the bill of lading were binding

upon the shipper merely because they had been filed with the Federal Maritime Board as a part of the carrier's tariff, when the filed bill of lading itself required acceptance by the shipper.

"B. Even assuming for further argument—but without conceding—that without receipt of the bill of lading the shipper was conclusively bound by those terms of the bill of lading which the law required the carrier to file with the Federal Maritime Board, the shipper is not bound by the exemption clauses in the filed bill of lading, since they are not a part of the tariff the law required to be filed."

5. Refused jury instructions regarding duties of carrier.

In connection with defendants' claim that injury to Aspen Pictures Inc. was due to the strike you are instructed that:

It is incumbent upon Matson Navigation Company to show that, notwithstanding the work stoppage and subsequent strike on the part of its employees, it had used every reasonable effort to preserve Aspen's property, to prevent it being damaged, and to cause it to be transported to its destination. The strike is no excuse if Matson did not do everything reasonably possible to prevent injury to Aspen (Rep. Tr. pp. 1011-1012, lines 18-26; 1).

In connection with the reasonableness of Matson Navigation Company's failure to give Aspen notice of the probability of delay in the shipping of the goods, you are instructed that:

If you find that Matson had knowledge of the delay or impending delay in delivery of Aspen's motion picture equipment and supplies, and you further find that Aspen

did not have knowledge of the delay or impending delay until too late to prevent it, then you must find that the failure of Matson to notify Aspen of the facts which Matson knew, which would probably delay or cause a delay in the transportation of Aspen's goods to Samoa, thereby denying to Aspen the opportunity to decide for itself what to do with its goods in order to prevent the delay, results in Matson's not being entitled to claim that the delay was not its fault, and in such event you must find that Matson is liable to Aspen for injuries caused by the delay (Rep. Tr. p. 1012, lines 7-26; p. 1013, line 1).

You are further instructed that once the plaintiff has proven that the goods to be shipped were properly delivered to the defendant and that a delay in the shipment of the goods has occurred, the burden of proving exonerating facts rests upon the defendants and the defendant must prove that the delay was not caused by any negligence on its part and was excused by the giving of proper notice of the probability of the delay to the plaintiff (Rep. Tr. p. 1024, lines 13-20).

6. Jury instructions given on burden of proof.

As to the issue of negligence, plaintiff has the burden of proof; that is to say, the burden is upon the plaintiff to prove negligence on the part of the defendants by a preponderance of the evidence (Rep. Tr. p. 992, lines 14-18).

7. Provision on reversible side of bill of lading incorporating COGSA.

"2. This bill of lading shall be deemed to incorporate and shall have effect subject to the provisions of the Carriage of Goods by Sea Act of the United States, approved April 16, 1936, and nothing herein contained shall be

deemed a surrender by Carrier of any of its rights or immunities or an increase of any of its responsibilities or liabilities thereunder, nor shall Carrier be deemed to have warranted the seaworthiness of the Vessel. The provisions in said Act shall (except as may be otherwise provided herein) govern before the Goods are loaded on and after they are discharged from the ship and throughout the entire time that they are in the custody of the Carrier. In respect of goods carried on deck and stated herein to be so carried, all risks of loss or damage by perils incident to such carriage shall be borne by Cargo Owner but in all other respects the custody and carriage of such goods shall be governed by the terms of this bill of lading and the provisions stated in said Carriage of Goods by Sea Act notwithstanding Section 1(c) thereof Carrier shall also have the benefit of Sections 181 to 189 inclusive of Title 46, U. S. Code, and of all other statutes of the United States or any other country which may be applicable in the circumstances to grant Carrier exemption from or limitation of liability." (Clerk's Tr. p. 26, Par. #2, Reverse Side of Bill of Lading).

FILED
JUN 3 1957
JOHN T. FEY, Clerk

In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 984

ASPEN PICTURES, INC.,
Petitioner,

vs.

THE OCEANIC STEAMSHIP COMPANY and
MATSON NAVIGATION COMPANY,
Respondents.

Brief of Respondents in Opposition

On Petition for Writ of Certiorari to the District Court of Appeal of the State of California, Second Appellate District

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OPINIONS BELOW

The opinions of the trial court on the motion for a new trial and of the District Court of Appeal of the State of California, Second Appellate District, Division One, are set forth at pages 10 and 16, respectively, of the appendix to the petition on file herein.

JURISDICTION

Respondents deny that this Court has jurisdiction as alleged in the petition. There are drawn in question in this

case contractual rights or immunities permitted under laws of the United States. Petitioner denies the existence of the contracts, but that contention has been resolved on a purely factual basis against it. The contracts (dock receipts and bills of lading) expressly incorporated the provisions of the Carriage of Goods by Sea Act as part of the contractual provisions.

Petitioner urges that, despite the contractual terms, the Carriage of Goods by Sea Act (herein sometimes called COGSA) is not applicable and that the Harter Act should be applied.

STATUTES AND REGULATIONS INVOLVED

The Carriage of Goods by Sea Act is not applicable *ex proprio vigore* but, as mentioned, was incorporated contractually in the dock receipts and bills of lading. Portions of COGSA are set forth at page 7 of the appendix to the petition. Other sections, particularly Sections 1304(2)(j) and 1307, Title 46, U.S. Code, are set forth in this brief.

As an alternative basis for certain jury instructions on the issue of notice of the terms of the agreement under which respondents accepted and held custody of petitioner's goods, respondents relied on the Intercoastal Shipping Act (Title 46, U.S. Code, Sections 843-848, particularly Sections 844 and 845(b), which require common carriers by water to file tariffs with the Federal Maritime Board (formerly United States Maritime Commission), and on the Shipping Act, 1916 (Title 46, U.S. Code, Sections 801-842, particularly Section 801, which defines a common carrier for the purposes of the other Act), all of which particular sections are set forth in the appendix to the petition. For the said jury instructions respondents also relied on the

provisions of Tariff Circular 3 (13 Federal Register 709 and Title 46, Code of Federal Regulations, Part 231, particularly Sections 231.0(j) and 231.5(g), which define a tariff and state the items which must be set forth in it). The latter sections are set forth in this brief.

Petitioner now claims to rely on the Harter Act (Title 46, U.S. Code, Sections 190-198), some portions of which are set forth in the appendix to the petition.

QUESTIONS

1. The first question presented by the petition relates to a matter unnecessary to the judgment below. The judgment is supported upon an independent ground of contract and agency law, not involving any federal statute or regulation.

2. The second question is a mixture of fact and law, based on erroneous factual assumptions, i.e., that the delay of the ship in question was or could have been reasonably anticipated. The verdict of the jury disposed of any factual questions.

3. The third question, like the second, relates to the issue of burden of proof. Petitioner now relies on the Harter Act and certain cases pertaining to the duty of providing a seaworthy ship. That duty is irrelevant to the case.

The claim of application of the Harter Act raises no substantial or important question, as petitioner impliedly conceded by its failure to even so much as mention that statute, directly or indirectly, in its petition for a hearing before the Supreme Court of the State of California. Since no hearing was granted, it may not be said that petitioner has waived the federal questions, but it has clearly indicated that they are not of real substance.

STATEMENT OF THE CASE

Petitioner seeks review of an appellate decision by the District Court of Appeal of the State of California, Second Appellate District, Division One, affirming a judgment entered upon a jury verdict in the Superior Court of the State of California in and for the County of Los Angeles. A further statement of the case is necessary as the petitioner has set forth more of an argument to a jury than a presentation of questions of law upon a settled state of facts.

The issues submitted to the jury were raised by the theory of the case adopted by petitioner during the trial. The jury found that the transportation of petitioner's goods was impossible because a strike intervened, that respondents were exonerated from liability because delay was caused by the strike, that respondents were not negligent in loading petitioner's goods in the circumstances then prevailing, that respondents could not have reasonably foreseen that the SS SIERRA would be affected by the strike, that reasonable care did not require that respondents notify petitioner of any possibility of delay, and that petitioner's goods were laden aboard the SS SIERRA in the course of reasonably prudent conduct and not in the face of any reasonably anticipatable delay. The jury also found that petitioner had notice of the terms and conditions contained in or referred to in the dock receipts which were exchanged for its goods when they were delivered to respondents on the dock prior to loading on the ship, and that petitioner also had notice of all the terms and conditions of the bills of lading. All of these facts are implied in the verdict and cannot be contested. There has never been any contention that the verdict is not supported by substantial evidence and such a contention cannot be raised at this time. Petitioner conceded in

its brief before the District Court of Appeal that there was a conflict in the evidence on the need for notice of the possibility of a strike. The resolution of that and other evidentiary conflicts by the jury is binding.

Only one italicized statement contained in the section of the petition herein entitled "Facts" is correct. All others are inconsistent with the verdict of the jury. Petitioner has merely stated its conclusions about matters which were the subject of conflicting evidence. The only italicized statement which is correct is that which relates that the bills of lading were not delivered until May 28. That fact does not change the situation because the actual delivery of the bills of lading was a formality routinely following actual loading. Agreement to the contract terms has been impliedly found by the jury. Petitioner had adequate notice of the terms and conditions under which respondents would have custody of its goods and of the terms and conditions of the contract of carriage before delivery at the dock, and the subsequent manual transfer of the bills of lading was not a prerequisite to the consummation of the agreement.

REASONS WHY CERTIORARI SHOULD NOT BE GRANTED

A. The First Question Deals with Factual Matters, Independently Supported; There Are No Conflicting Decisions.

1. THE DECISION BELOW IS SUPPORTED ON INDEPENDENT GROUNDS, WITHOUT RELIANCE ON THE BINDING EFFECT OF NOTICE OF BILL OF LADING PROVISIONS SET FORTH IN A TARIFF.

Petitioner's first point relates to a matter which was an alternative basis for a finding by the jury. Independent of the question of the effect of the filing of a bill of lading as a part of a tariff there was adequate factual evidence that the petitioner had notice of and consented to the terms as a matter of contract.

Petitioner's statement of the case has not advised this Court of the important fact that it was issued a series of dock receipts at the time its goods were delivered to the respondents. The dock receipts were placed in evidence as Exhibits B, H, K and L. They were originally prepared on behalf of petitioner by its agent, Barnett International Forwarders, Inc., which had in its possession a stock of the respondents' forms. The agent prepared the dock receipts and had them presented to respondents for execution when the cargo was delivered to the dock. These acts were adopted and ratified by petitioner through its conduct in using the dock receipts, in providing them to respondents for execution, and in allowing respondents to rely on them in preparing the bills of lading. The dock receipts set forth the terms and conditions upon which respondents gained and held custody of the goods. Each of them contains the following statement in bold type:

> **"The goods above specified were received upon the understanding, and shipper by accepting duplicate dock receipt agrees, that except as otherwise provided herein the custody and carriage of said goods by The Oceanic Steamship Company shall be governed by the contractual terms and conditions of that Company's regular form of bill of lading, before as well as after its issuance * * * during any time that the goods are in the custody of the Company prior to loading, the Company shall hold them as warehousemen only and in the event of loss or damage during such time shall not be subject to the Burden of Proof prescribed by Section 4(2)(Q) of the Carriage of Goods by Sea Act."**

By accepting the dock receipts petitioner received notice of the contractual terms and conditions under which its goods would be handled by respondents from that moment on and agreed to them. As to the bill of lading terms, it was on notice and was bound by what it could have found in the

exercise of due diligence. Its own agent had copies of the bill of lading form. Furthermore, the full text of the tariffs, including the bills of lading, were open for inspection by the public at various offices of respondents as well as in the files of the Federal Maritime Board.

Petitioner's agent, the freight forwarder, was familiar with both dock receipts and bills of lading, and its knowledge of their terms and provisions, used in the ordinary course of the business for which the agent was engaged, was imputable to the petitioner. The jury was properly instructed on the issues of agency and the imputation of knowledge to a principal. The jury impliedly found in favor of respondents on all of these issues.

Under these circumstances the ultimate delivery of the bills of lading was a mere formality. The legal intent of the parties had been established long before the strike intervened, and both parties had accepted and acted upon the contractual terms referred to in the dock receipts.

By a carefully restricted statement of the case petitioner has attempted to create a federal question pertaining to the effect of the filing of a tariff which has set forth within it a complete regular form of bill of lading. The other theory which supports the judgment has been ignored. It is a factual defense, based on proof of adequate notice and acceptance and simple provisions of state law; it is not a basis for exercise of this Court's jurisdiction.

2. THE OPINION BELOW CONFLICTS WITH NO OTHER DECISIONS, IS CORRECT AND REQUIRES NO REVIEW.

Even were petitioner's first point the sole basis for the judgment below, it is without merit. The tariff applicable to the transaction was filed pursuant to the terms of the Intercoastal Shipping Act (Title 46, U.S. Code, Sections 843 to

848, inclusive). Section 844 of that statute requires that a carrier

> "* * * shall file with the United States Maritime Commission and keep open to public inspection schedules showing all the rates, fares, and charges for or in connection with transportation * * * The schedules filed and kept open to public inspection as aforesaid by any carrier shall plainly show * * * *any rules or regulations which in anywise change, affect, or determine any part or the aggregate of* such aforesaid rates, fares, or charges, or *the value of the service rendered to the* passenger, *consignor, or consignee.*
>
> * * * * * * *
>
> The commission shall by regulations prescribe the form and manner in which the schedules required by this section shall be published, filed, and posted * * *" (Emphasis supplied.)

The Intercoastal Shipping Act, by Section 845b, is applicable to the shipment of cargo from California to American Samoa through operation of Section 801 of the Shipping Act, 1916 (Title 46, U.S. Code, Sections 801 to 842, inclusive).

Pursuant to the authority vested in the United States Maritime Commission (now the Federal Maritime Board), regulations were promulgated which were applicable to the tariff and the bills of lading under which respondent undertook to transport petitioner's goods. The regulations are found in Tariff Circular 3, *supra.*

Section 231.0(j) of the Regulations defines a tariff:

> "§ 231.0 *Definitions.* The following definitions of terms used in this part will apply unless the context indicates otherwise:
>
> * * * * * * *
>
> (j) 'Tariff': A publication containing the actual rates, fares, charges, classifications, *rules, regulations*

and practices of a common carrier for transportation by water." (Emphasis supplied.)

Section 231.5(g) states the requirements of a tariff:

"§ 231.5 *Contents of tariff publications.* Tariffs shall contain in the order named:

• • • • • • •

(g) *General rules and regulations.* General rules and regulations in clear and definite terms which govern the rates, fares, or charges in the tariff, the title or subject of each rule or regulation to be in distinctive type. Under this heading shall be shown all provisions which affect the charges for or the value of the service, such as separate charges for demurrage, wharfage, heavy lifts, long lengths, or other services in connection with the transportation and to what extent the rates, fares or charges in the tariff or schedule include such services, *and any other rule necessary to state plainly the arrangements sought to be established.* • • •" (Emphasis supplied.)

A tariff is not merely a list of rates but a statement of any contractual arrangement affecting or determining in any manner the value of the service rendered. The statute has been so interpreted by the Maritime Commission.* In the exercise of its function of determining the propriety of tariffs, bills of lading and charges, the Commission has specifically required that "any provisions of a bill of lading which affect the charge for transportation or the value of the service, to be effective, must be incorporated in the tariff." Docket 418, 2 U.S. Maritime Commission Reports, 143 at 145, and 150. See also Dockets No. 571 and No. 572 at pages 558, 581 and 584 of the same volume.

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*In construing a statute, the interpretation given to it by the administrative body charged with its enforcement is entitled to weight. *Boston & Maine R.R. v. Hooker*, 233 U.S. 97.

The tariff applicable to petitioner's shipment contained, in the manner which is common in the shipping industry, a statement under the heading "Rules and Regulations" that all shipments are subject to the terms of the bill of lading published on specified pages of the tariff.

The cases relied on by petitioner are inapposite. *New York, N.H. and H.R. Co. v. Nothnagle,* 346 U.S. 128 (1953), pertains to the attempt by a railroad to relieve itself from a duty of care. It has nothing to do with the inclusion in a bill of lading by contract of an exculpation from liability by reason of impossibility of performance. It may be against public policy for a carrier to attempt to relieve itself of its duty of care, but it cannot be said to contravene public policy for a carrier to adopt by contract the excuse of impossibility for nonperformance which is contained in a federal statute which adopts the international shipping policy known as the Hague Rules.

Pacific S.S. Co. v. Cackette, 8 F.2d 259 (CA 9, 1925), cert. den. 269 U.S. 586 (1926), and *Bernard v. U.S. Aircoach,* 117 F. Supp. 134 (DC, SD, Cal., 1953), simply hold it to be against public policy to insert shortened periods of limitations in tariffs. They do not take into account the very broad requirements of the Regulations quoted above. Since a carrier subject to them must set forth "the arrangements sought to be established," it would breach its obligations if it did not include in the tariff the contract of affreightment, including the excuses for nonperformance. Respondents conformed to the Regulations and are entitled to their benefits.

Petitioner has ignored the Regulations, yet they control the case and were foreign to the cases relied on by petitioner.

Boston & Maine R. v. Hooker, 233 U.S. 97 (1914), and *Western Union Tel. Co. v. Esteve Bros. & Co.*, 256 U.S. 566 (1921), were first cited by respondents and are entirely consistent with the judgment.

There being no conflict with any relevant decision, and the decision below being consistent with the applicable Regulations, there is no reason for granting certiorari on the first question.

B. The Second Question Turns on Factual Findings Already Made in Favor of Respondents; There Is No Issue of Law.

1. PETITIONER ADMITS THAT IT HAD THE BURDEN OF PROOF OF NEGLIGENCE WHERE DELAY IS CAUSED BY AN EXCEPTED CAUSE.

In an action for delay in the transportation of goods, the proof can be broken down into (a) *prima facie* evidence of delivery to a carrier and failure of redelivery at the point of destination in a reasonable time, (b) evidence by the carrier of an intervening cause excusing nonperformance, and (c) evidence by the shipper of negligence depriving the carrier of its excuse. Petitioner admits that it has the burden of proof of parts (a) and (c) and claims that respondents failed to prove (b).

Petitioner's difficulties in this case are, first, that questions of fact cannot be reopened, and, second, that parts (a) and (b) were the subject of admissions in the pleadings and of indisputable proof. A finding of nonexistence of the excuse for nonperformance was precluded for, as stated by the District Court of Appeal:

> "It was undisputed, therefore, that the delay in the sailing of the SIERRA was caused by strike." (Petition Appendix, p. 29.)

Under the circumstances, petitioner is simply disguising as a question of law an issue of fact which it conceded in its

amended complaint. The question of the intervention of the strike as the cause of delay required no litigation.

> "Every material allegation of the complaint, not controverted by the answer, must, for the purpose of the action, be taken as true * * *" (California Code of Civil Procedure, Section 462.)

The only issue to be decided in the trial was part (c)—whether respondents were negligent so as to be deprived of the benefit of the legal excuse. Petitioner concedes it had the burden of part (c), but it failed to sustain the burden for the jury found that respondents were not negligent.

2. THERE IS NO CONFLICT OF OPINIONS.

The only burden of proof remaining in the case was upon the petitioner to show negligence. There is no conflict of opinions that such a burden is upon the shipper.

> "When appellee [the carrier] proved that the loss arose from an excepted cause, it discharged the burden resting immediately upon it."
>
> *The Maui,* 113 F.2d 1018 (CA 9, 1940).

The petitioner had to show negligence to make respondents liable despite the exculpatory clause. The authorities cited in the opinion below entirely support this principle and they are in accord with *The Maui* and the decision in *American Tobacco Co. v. SS Katingo Hadjipatera,* 194 F.2d 449 (CA 2, 1951), cert. den. 343 U.S. 978. See also Knauth on Ocean Bills of Lading, Fourth Edition, page 195; Carver's Carriage of Goods by Sea, Ninth Edition by Raoul P. Colinvaux, page 118; and Scrutton on Charterparties and Bills of Lading, Twelfth Edition by S. L. Porter, K. C., and W. L. McNair, page 282.

Schnell v. The Vallescura, 293 U.S. 296 (1934), is entirely consistent with the above. The discussion in that decision of

intermingled causes of loss does not detract from the basic principle. Petitioner's other cases (*Commercial Corp. v. N. Y. Barge Corp.*, 314 U.S. 104 (1941), and *The Edwin I. Morrison*, 153 U.S. 199 (1894)) are concerned with the warranty of seaworthiness of a ship, an irrelevant matter in this case. The rule on burden of proof was the same for many years before there were any statutes on the subject. See *Clark v. Barnwell*, 53 U.S. 272, 279 (1851).

The confused reference to "antecedent" negligence is meaningless. If respondents were negligent in a manner causing injury, the jury was instructed to find liability.* Since the jury found that there was no negligence contributing to the delay, this Court is not properly called upon to go behind its verdict. It is not argued that there is no substantial evidence to support it.

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*"This general rule of immunity, however, is subject to the limitation or qualification which I shall now state to you.

"The common carrier owes to the shipper the duty to exercise ordinary care in the handling of the shipper's property so as to avoid causing the shipper loss or damage, and the duty also to inform the shipper of any fact or facts which are known to the carrier but unknown to the shipper and which a person of ordinary prudence in the carrier's position would recognize as being likely to cause a substantial delay or detention of the shipper's goods beyond the usual time in transit. The reason for imposing the latter duty upon the carrier is to afford the shipper in such circumstances the opportunity to exercise his own judgment as to whether to make the shipment or to make other arrangements.

"The standard of care required of the carrier in the performance of these duties is that of ordinary and reasonable care. Neither the terms of the bill of lading nor the terms of any federal law operates to relieve a carrier of liability to a shipper for damage proximately caused by a breach of either of the duties which I have just defined. If you find that the defendant carrier in this case was negligent in respect to the performance of its duty to plaintiff, as I have defined that duty, and if such negligence was the proximate cause of damage to plaintiff, then plaintiff is entitled to recover." (Clerk's Transcript, pp. 91-92.)

C. The Third Question Depends Entirely on the Harter Act, Which Is Irrelevant.

1. RESPONDENTS CLAIM NO RELIEF FROM LIABILITY BY REASON OF THE HARTER ACT.

The Harter Act prohibits in Section 1 the insertion in bills of lading or shipping documents of any clause, covenant or agreement whereby the carrier shall be relieved from liability for loss or damage arising from negligence, fault or failure in proper loading, stowage, custody, care or proper delivery. Respondents did not insert any such clause in the bill of lading or any shipping document. They did not claim to be relieved from liability for negligence, fault or failure; they merely claimed they were not guilty of any negligence, fault or failure. This raised a factual issue which has been decided against the petitioner.

By Section 2 of the Act a carrier is prohibited from inserting in any bill of lading or shipping document any covenant or agreement lessening or avoiding the obligation to exercise due diligence properly to equip a ship and to make it seaworthy. Respondents did not include any such covenant or agreement. As an afterthought on appeal, petitioner has asserted the theory that due diligence was not used to obtain men who would not strike. This peculiar theory was rejected in *The Maui, supra.** Furthermore, respondents adduced proof, which was uncontradicted, that the only available source of seamen was the Sailors Union of The Pacific, the very union which was on strike. Hence, as a factual matter, this theory has been decided against petitioner.

By Section 3 a carrier is relieved of responsibility for loss or damage which results from fault or error in navigation or management of the ship, providing due diligence has been

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*See also Knauth, op. cit., page 223, for authorities holding that it is not necessary to concede the demands of strikers in order to be relieved of liability. If it were, the strike clause would be vitiated.

exercised to make the vessel seaworthy and to man and equip it. Respondents did not rely on the Harter Act in the trial court and have never contended that loss or damage to petitioner resulted from fault or error in navigation or management of the vessel. Because of this, the issues of seaworthiness and manning of the ship have never been relevant to the case. If respondents do not rely on that exception from liability, there is obviously no need for them to prove the prerequisite to the exception.

The petitioner has apparently misconceived the import of the cases applying the exception from liability allowed by the Harter Act. Under those cases if a carrier claims the benefit of a Harter Act exception, it has the burden of proving due diligence in regard to seaworthiness, manning and equipping, but those cases have no relationship to the issue of the burden of proof as it relates to the exceptions under COGSA, whether the Act is applicable *proprio vigore* or contractually.

2. THE HARTER ACT DOES NOT BECOME OPERABLE UNTIL A VESSEL BREAKS GROUND.

Petitioner insists that the Harter Act applies before a voyage begins, but has cited no authorities to support this proposition. It is true that certain acts of a carrier which will constitute due diligence must necessarily take place before a voyage has started, but this has nothing to do with the time when the statute becomes operable so that rights and duties may become fixed thereunder.

Petitioner has cited as authority 1 Benedict on Admiralty (Sixth Edition, revised by A. W. Knauth), Section 95, page 287. Petitioner failed to read sufficiently far in that section. On page 289 it is stated:

> "The [Harter] Act is not applicable until the voyage has commenced * * *."

The reason for this is clear from the statement in the same work on page 288:

> "The burden is cast upon the shipowner to prove (where loss is claimed to have been due to unseaworthiness) that the vessel was seaworthy at the commencement of the voyage or (as a condition to exemption from liability for a loss by faults and errors in navigation) that due diligence (which comprehends inspection) had been exerted to make her so."

In Mr. Knauth's volume on Ocean Bills of Lading, the operation of the Harter Act and COGSA are considered at length from page 163 to page 171. It is unquestionably Mr. Knauth's view that the Harter Act has absolutely no effect upon the case before the Court, because the voyage had not begun. It is said at page 167:

> "While neither the Harter Act nor the 1936 Act [COGSA] takes effect *proprio vigore* at the moment when the goods are received for shipment, and while the common or admiralty law controls up to the moment when the ships tackles are hooked on for the purpose of loading, the parties may undoubtedly agree to apply the terms of either Act instead of the common or admiralty law; and this is usually done in the bills of lading now in use."

That is exactly what was done in this case. By reason of the terms of the dock receipts and the bills of lading the parties agreed as a matter of contract that the terms of COGSA should apply from the moment the goods were received for shipment.

3. RESPONDENTS WERE RELIEVED FROM LIABILITY BY CONTRACT.

COGSA provides in Section 7 as follows:

> "Nothing contained in this Act shall prevent a carrier or a shipper from entering into any agreement, stipulation, condition, reservation, or exemption as to the

responsibility and liability of the carrier or the shipper for the loss or damage to or in connection with the custody and care and handling of goods prior to the loading on and subsequent to the discharge from the ship on which the goods are carried by sea."

Inasmuch as COGSA becomes operable only after goods are loaded and the Harter Act becomes operable when the ship breaks ground, the parties had the right to enter a contract excusing respondents from liability for loss, delay or damage by reason of a strike, through incorporation in the contract of the terms of COGSA. This was done in the bills of lading and, were there merit in the suggestion that the bills of lading were not actually issued until after the goods were loaded, the same provisions were incorporated by reference in the dock receipts which set forth the contractual terms under which respondents received and held custody of petitioner's goods before the loading occurred, from the moment of receipt.

In the decision below it is not ruled that the Harter Act may have no application to the duties of a carrier, as asserted by petitioner. It has merely been ruled that it has no application to the duties of the carrier in this particular case, a conclusion which is inevitable from the authorities above discussed.

CONCLUSION

The petition herein is largely based upon factual matters resolved against petitioner by a trial jury. There is no occasion for this Court to review such matters.

The question of the notice which petitioner had of the terms of the dock receipts and bills of lading is completely supported by a factual finding. Even were it not, petitioner has shown no conflicting decisions, for this case is governed

by federal regulations not considered in any cited authority and completely ignored by petitioner.

The second question purports to reopen matters disposed of by the pleadings and by uncontradicted evidence. The only issue triable to the jury was whether respondents were negligent. It is conceded that petitioner had the burden of proof on that issue, and the jury resolved the conflicting evidence against it. The authorities are in agreement that the burden of proof as to negligence, which deprives a carrier of the exculpation from liability provided by the strike clause of COGSA, is upon the complaining shipper.

The third question, which refers to the Harter Act, provides no basis for the granting of the writ because the Harter Act is irrelevant. The parties were entitled to agree by a contract that the provisions of COGSA should govern their relationship, which they did. The Harter Act was not relied upon defensively and, in any event, did not become operable as the voyage was never begun.

For the foregoing reasons it is respectfully urged that this petition for a writ of certiorari should be denied.

Dated: San Francisco, California, May 31, 1957.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956.

No. 984.

ASPEN PICTURES, INC.,
Petitioner,

vs.

THE OCEANIC STEAMSHIP COMPANY and MATSON NAVIGATION COMPANY,
Respondents.

REPLY BRIEF OF PETITIONER TO BRIEF OF RESPONDENTS ON PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT.

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I. INTRODUCTION.

Throughout their entire Reply Brief, Respondents have restated the argument that this Court does not have jurisdiction since a variety of factual conflicts have been resolved impliedly against Petitioner by the jury's adverse verdict.

The rule of law that on appeal conflicts of evidence are deemed to have been conclusively resolved against the appellant by the trier of fact, has no application here. The questions presented to this Court derive from Petitioner's contention that the jury was improperly instructed on the applicable federal law. When the very instructions on which the jury rendered its verdict are the subject of an appeal, the proper rule of law is that the evidence must be construed most favorably to the Petitioner in passing upon the erroneous instructions. The reason for this rule is evident—without such a rule the erroneous instructions could seldom be challenged, even though the giving of the erroneous instructions was the reason for the jury's verdict.

Jaynes v. *Jaynes*, 98 Cal. App. 2d 447, 220 P. 2d 598 (1950);

O'Mera v. *Swartfiguer*, 191 Cal. 12, 15, 214 Pac. 975 (1923);

4 *Cal. Jur.* 2d 443.

The rule is stated in the *Jaynes* case, *supra*, at page 451, the court quoting in part from the *O'Mera* case, *supra*:

> "While in determining whether a verdict is supported by the evidence, we must assume that the jury accepted the view most favorable to respondent, nevertheless, *in considering erroneous instructions*, 'we must assume that the jury might have believed the evidence upon which the instruction favorable to the losing party was predicated, and that if the correct instructions had been given upon that subject the jury might have rendered a verdict in favor of the losing party.'" (Emphasis added).

Under this rule of law Petitioner's factual statement is correct, and the arguments advanced in the Petition for Writ of Certiorari are uncontradicted by Respondents' Brief.

II. REASONS FOR GRANTING THE WRIT.

A. The California Court's Decision Is in Conflict with the Decision of This Court and of the Ninth Circuit Court of Appeals, in Holding a Shipper Conclusively Bound by a Clause Which Exempted the Carrier from Liability for Strike-Caused Damages Contained in a Bill of Lading Filed with the Federal Maritime Board.

1. Respondents' Claim That the Decision Below Is Supported on Independent Grounds, Is Unsupported by the Record.

Respondents claim that independent of the instructions relating to the effect of the filing of a bill of lading as a part of a tariff, the jury could have found that the shipper had notice of, and consented to, the terms as a matter of contract.

This argument ignores the fact that the question of the entering into a contract was never submitted to the jury since the trial court regarded the shipper as conclusively bound by the terms of the filed bill of lading. Petitioner sought a jury instruction to place the factual conflict over the making of the contract for carriage before the jury, and this instruction was refused. (See Pet. Appen. pp. 39-40). In lieu of the refused instruction, the trial court instructed the jury that the Petitioner was conclusively bound by the terms of the bill of lading, once the carrier proved that it was filed with the Federal Maritime Board. (Pet. Appen. pp. 38-39).

There were a series of factual conflicts concerning the making of the contract which were removed from the jury's consideration. Respondents assume that, since the dock receipts were received by a freight forwarder (i. e. Barnett International Forwarders, Inc.), therefore the forwarder

was the agent for Petitioner for purposes of making the contract of carriage. However, Petitioner had contended, and there was uncontradicted evidence to the effect that, Petitioner had employed Barnett solely to assist in obtaining custom's clearance, and that Barnett acted as Petitioner's agent for no other purpose. Furthermore, there was the question of Respondents' fraud in purporting to make a contract with Petitioner (*i. e.* bill of lading) at a time when Respondents knew, and knew that Petitioner was unaware, that the contract could not be performed. Of course, if such fraud existed, it would have avoided the claim of consent to a contract. The applicable theory and cases regarding this fraud are briefly set forth in the Petition at page 11. Consistent with its erroneous position that Petitioner was conclusively bound by the terms of the filed bill of lading, the trial court refused Petitioner's instructions on the questions of fraud (Appendix to Pet. for Writ of Cert. pp. 39-40).

In short, the claimed alternative ground for the decision on this point, was never submitted to the jury, and it is idle to speculate on what the jury might have done, had the issue been properly presented. The fact that this defense was an afterthought even to Respondents is demonstrated by the fact that the Dock Receipts quoted in Respondents' Reply Brief were not pleaded as a part of the contract in Respondents' affirmative defenses based upon the contract, nor was the effect of the Dock Receipts argued before the trial court. The theory first found expression in Respondents' brief before the California District Court of Appeal.

2. Respondents' Contention That the Opinion Does Not Conflict with the Decisions of This Court and the Ninth Circuit Is Erroneous.

It is submitted that the distinctions Respondents suggest, between the instant case and *New York, N. H. and*

H. R. Co. v. *Nothnagle*, 346 U. S. 128 (1953), and the other cases cited and discussed in the Petition for Writ of Certiorari at pages 11-15, are distinctions without a difference.

B. Respondents Erroneously Rely on Their View of the Law That Evidentiary Conflicts Are to Be Resolved Against Petitioner, to Reach the Conclusion That the Second Question Turns on Factual Findings Made in Favor of Respondents.

Petitioner is here disputing the basic instructions on the burden of proof. It is erroneous to resolve the disputed facts in favor of Respondents when the jury rendered its verdict on instructions which Petitioner has shown in its Petition to be erroneous statements of the law.

Petitioner made no concession that it had the burden of proof of negligence, where delay is caused by an excepted cause applicable to the present case.

Respondents' analysis of the proof in an action for delay in the transportation of goods is oversimplified. By omitting the steps where the court committed error, the analysis reaches its erroneous conclusion. The proper analysis is as follows:

(a) The shipper must show *prima facie* evidence of delivery to a carrier and failure of redelivery at the point of destination in a reasonable time.

On this point both parties are in agreement. The burden of proof was on Petitioner, and Petitioner established the facts without contradiction.

(b) The carrier must show that it was entitled to an exemption either by reason of applicable law, or by proving a contractual exemption not in conflict with law.

Respondents concede that no exemption was available to them by statute (Brief p. 2). Therefore the Respondents had the burden of proving a valid contract, granting them exemption. Respondents did not meet this burden. They never even claimed any exemption under the contract, from the necessity of giving notice because the contract had no provision with reference to the question of notice—so the burden of proving their freedom from negligence in failing to give the notice was upon them. Thus, this decision, in holding to the contrary, is in conflict with the cases cited in the Petition. (Petition pp. 16-18). Nor did their contract exempt them from negligently loading the goods on a ship in the face of an anticipated strike. Again, no contractual exemption supports the view of the courts below or excuses their failure to follow the proper decisions of federal courts. Indeed, Respondents' reliance on the contract at all, is misplaced in view of the failure of the trial court to submit the question of the entering into the contract to the jury. (See argument under point A).

(c) If the carrier establishes that an exemption exists on which it may rely, it must then prove that the cause of the loss was due to the exempted cause, and not to some other cause.

This is the clear rule of *Schnell* v. *the Vallescura*, 293 U. S. 296 (1934), and other cases cited and discussed in the Petition at pages 18-20. This step of the analysis is omitted in Respondents' Brief, and so they have failed to contradict the statement of law set forth in the Petition.

Any assumption that Petitioner did not dispute that the strike was the *cause of the loss* is unwarranted in view of the complaint (Clk. Tr. p. 12, lines 1-20), and unjustified by the opinion of the California District Court of Ap-

peal. The opinion, as properly quoted by Respondents, states:

> "It was undisputed, therefore that the delay in the sailing of the SIERRA was caused by the strike." (Petition, Appendix, p. 29).

Certainly it was true that the *sailing* of the SIERRA was delayed due to the strike, but this does not warrant the assumption that the *damage to Petitioner* was due to the strike. Petitioner's contention throughout was that, but for Respondents' negligence in loading the goods on the SIERRA and in failing to give Petitioner notice of the anticipated strike, the delay in the sailing of the SIERRA would have been immaterial, for Petitioner's goods would not have been aboard the SIERRA. The legal question turned on a factual dispute, not over whether the SIERRA'S sailing was delayed due to the strike, but on whether Respondents were negligent in loading Petitioner's goods on the SIERRA and in failing to give Petitioner notice of the anticipated strike. Throughout the entire case to this point, Respondents have successfully obscured this basic distinction, despite Petitioner's attempts to make this distinction clear.

(d) Even after the carrier has established that it was entitled to an exemption (which Respondents failed to do here), and that the exempted cause was the actual cause of the damages (which Respondents have likewise failed to do here), Respondents must still prove themselves free from antecedent negligence contributing to the loss.

Respondents attempt to circumvent the real issue here by stating that Petitioner's reference to "antecedent negligence" is meaningless, because if respondents were negligent in any manner the jury was instructed to find

liability. The issue here presented—which Petitioner claims was resolved in conflict with existing decisions—is not whether or not Respondents would be liable for negligence (Respondents conceded this), but on whom rested the burden of proving the negligence or freedom therefrom. Respondents fail to address their Brief to the law stated in the Petition at pages 20-22, that the burden of proving itself free from antecedent negligence is upon the carrier, and so impliedly concede the correctness of Petitioner's position.

(e) Only after all of the foregoing points have been covered does the burden of proof shift to the shipper to prove that, notwithstanding an applicable exception which was the cause of the loss, the carrier's negligence occurring after the facts giving rise to the exemption, subjected the carrier to liability.

Since this point had not been reached, the burden of proof should not have been placed on Petitioner, and the decision of the courts below in placing it on Petitioner is in conflict with the decisions of the other courts in the decisions cited and discussed more fully in the Petition.

C. The Harter Act Is Clearly Relevant, and the Confusion Between This Decision and That of the Circuit Courts Should Be Resolved in This Court.

Respondents' argument on this point fully supports Petitioner's position. This is clear from the quotation upon which they rely from 1 *Benedict on Admiralty* (6th Ed., revised by A. W. Knauth), p. 288:

> "The burden is cast upon the shipowner to prove (*where loss is claimed to have been due to unseaworthiness*) that the vessel was seaworthy at the commencement of the voyage or (*as a condition to exemption from liability for a loss by faults and errors*

in navigation) that due diligence (which comprehends inspection) had been exerted to make her so." (Emphasis added).

This is precisely the point made in Petitioner's Petition at page 27. The language of the Act relating to the ship's breaking ground is with reference to the test of seaworthiness of the time the ship breaks ground, *when the carrier seeks exemption from a loss claimed to have been due to unseaworthiness* and when the *carrier* seeks exemption from liability for a loss by faults and errors in navigation.

Here, the lower courts have been misled by this language, and unfamiliarity with the law of Admiralty to conclude—even though it was the *shipper* (not the carrier) who was seeking the benefit of the Act—that all the provisions of the Harter Act were not effective until the ship breaks ground.

The above quotation emphasizes Petitioner's position that the Act provides only that the *carrier* does not get exemptions in the act (applicable after the voyage has commenced) unless his ship meets the test of being seaworthy at the time the ship breaks ground. The Act does not provide that the benefits for the protection of the *shipper* (which relate to conduct prior to sailing) are of no force unless the ship breaks ground.

Since the Harter Act is controlling as federal law, its limitations over contracts prevent the carrier from taking advantage of those provisions in the claimed contract which the carrier claims exempt it from liability.

SUMMARY AND CONCLUSION.

Apparently realizing that their reply could not be substantiated on the law, Respondents claim that the facts of this case preclude the presentation of questions within this Court's Jurisdiction. All this argument is based on Respondents' erroneous assumption that the facts are concluded by a jury verdict, when the legal issues involve the correctness of the jury instructions themselves.

Stripped of its illfounded factual argument, the weakness of Respondents' legal argument in the Reply Brief merely emphasizes the conflict between the decision below and those of the Circuit Courts and of this Court.

The determination of these questions relating to the basic law of contracts in Admiralty are within the jurisdiction of this Court, and are of paramount importance to the large segment of the business community relying upon water commerce for the transportation of goods.

Respectfully submitted,

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